No.

In the Supreme Court of the United States

Term

H. M. TRIMBLE & SONS, LIMITED,
Petitioner

vs.

KINGSLEY AND KEITH (Canada) LIMITED and KINGSLEY AND KEITH CHEMICAL CORPORATION,
Plaintiffs/Respondents

MERCER INTERNATIONAL CORPORATION and INTERSTATE CHEMICAL CORPORATION,
Defendants/Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the three-pronged test for determining the existence of requisite "minimum contacts" to justify the exercise of long-arm jurisdiction (as utilized by the Superior Court of Pennsylvania) is constitutionally appropriate, the Supreme Court of Pennsylvania being equally divided on the issue.

II. Irrespective of the appropriateness of the three-pronged test, whether the mere pleading of a contract having a "significant connection" with the forum state is constitutionally sufficient to meet the "minimum contacts" standard, the Supreme Court of Pennsylvania being equally divided on the issue.

III. Given the probability that the alleged contamination occurred beyond Pennsylvania's borders, whether the non-resident defendant's one trip into Pennsylvania was sufficient to meet the "continous and substantial" test previously laid down by your Honorable Court.

IV. Inasmuch as the non-resident defendant had contact with Pennsylvania only with respect to *one* of the two loads of methylene chloride in question, whether its connection with Pennsylvania was substantial enough to make it "reasonable" for Pennsylvania to exercise long-arm jurisdiction to adjudicate contamination disputes relating to both loads.

V. Whether Pennsylvania has a legitimate interest in adjudicating a breach of contract dispute between two foreign corporations.

TABLE OF CONTENTS

	PAGE
Questions Presented for Review	i
Reference to Official Reports	1
Statement of Jurisdiction	2
Constitutional Provision	2
Statement of the Case	3
Argument	7
Conclusion	17

APPENDIX:

1. Pennsylvania Supreme Court's Opinion in Support of Affirmance and Opinion in Support of Reversal, as Reported at 456 A.2d 1333 ..... 1a
2. Pennsylvania Superior Court Panel Opinion of June 26, 1981, Affirming Common Pleas Order, as Reported at 435 A.2d 585 ..... 16a
3. Pennsylvania Superior Court Panel Opinion of October 24, 1980, Reversing Common Pleas Order, as Reported at 426 A.2d 618 31a
4. Opinion of the Court of Common Pleas of Mercer County Pennsylvania, Filed April 11, 1979 in Support of the Order Dated January 15, 1979 ..... 45a
5. Per curiam Order Filed by the Supreme Court of Pennsylvania on February 9, 1983 60a
6. Letter of March 31, 1983 From Carl Rice, Prothonotary of Supreme Court of Pennsylvania, Advising That the Application for Reargument Had Been Denied on March 28, 1983 ..... 62a

TABLE OF AUTHORITIES

CASES:

Aftanase vs. Economy Baler Co., 343 F.2d 187 (8th Cir. 1965) 14

Bork et ux. vs. Mills, 458 Pa. 228, 329 A.2d 247 (1974) 11

Bross Utilities Service Corp. vs. Aboubshait, 489 F. Supp. 1366 (D. Conn. 1980), aff'd, 646 F.2d 559 (2d Cir. 1980) 14

Carty vs. Beech Aircraft Corp., 679 F.2d 1051 (3d Cir. 1982) 10

Columbia Metal Culvert Co. vs. Kaiser Industries Corp., 526 F.2d 724 (3d Cir. 1975) 16

Crompton vs. Park Ward Motors, Inc., 299 Pa. Superior Ct. 40, 445 A.2d 137 (1982) 16

Doyn Aircraft, Inc. vs. Wylie, 443 F.2d 579 (10th Cir. 1971) 8

Image Ten, Inc. vs. Walter Reade Organization, Inc., 456 Pa. 485, 322 A.2d 109 (1974) 15

International Shoe Co. vs. Washington, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945) 7, 9

Iowa Electric Light & Power Co. vs. Atlas Corp., 603 F.2d 1301 (8th Cir. 1979), cert. denied, 445 U.S. 911, 63 L.Ed. 2d 327, 100 S.Ct. 1090 (1980) 10

Kenny vs. Alexson Equipment Co., 495 Pa. 107, 432 A.2d 974 (1981) 10, 11

Kingsley & Keith Ltd. vs. Mercer International Corp., 291 Pa. Superior Ct. 96, 435 A.2d 585 (1981) 9

Kulko vs. California Superior Court, 436 U.S. 84, 56 L.Ed. 2d 132, 98 S.Ct. 1690 (1978) 15

Nissley vs. JLG Industries, Inc., Pa. Superior Ct. , 452 A.2d 865 (1982) 15

Perkins vs. Benguet Consolidated Mining Co., 342 U.S. 437, 96 L.Ed. 485, 72 S.Ct. 413 (1952) 12, 13

Proctor & Schwartz, Inc. vs. Cleveland Lumber Co., 228 Pa. Superior Ct. 12, 323 A.2d 11 (1974) 8

Reliance Steel Products Co. vs. Watson, Ess, Marshall & Enggass, 675 F.2d 587 (3d Cir. 1982) 12

Rosen vs. Solomon, 374 F. Supp. 915 (E.D. Pa. 1974) 14

Shern vs. Tractor Supply Co. of Grand Forks, 381 F. Supp. 1331 (D.N.D. 1974) 15

Southern Machine Co. vs. Mohasco Industries, Inc., 401 F.2d 374 (6th Cir. 1968) 8

World-Wide Volkswagen Corp. vs. Woodson, 444 U.S. 286, 62 L.Ed. 2d 490, 100 S.Ct. 559 (1980) 7, 13, 14, 16

MISCELLANEOUS:

Note, Jurisdiction Over Nonresident Corporations Based on a Single Act: A New Sole for International Shoe, 47 Geo. L. J. 342 (1958) 8

Section 35(3) of the Restatement (Second) of Conflict of Laws 12

REFERENCE TO OFFICIAL REPORTS OF OPINIONS

The opinions delivered by the courts below in the case at bar are officially and unofficially reported as follows:

1. Pennsylvania Supreme Court's opinion in support of affirmance and opinion in support of reversal reported at 456 A.2d 1333.

2. Pennsylvania Superior Court panel opinion affirming Common Pleas order reported at 291 Pa. Superior Ct. 96, 435 A.2d 585.

3. Pennsylvania Superior Court panel opinion reversing Common Pleas order reported at 426 A.2d 618, but later withdrawn from publication.

STATEMENT OF JURISDICTION

The per curiam order of the Supreme Court of Pennsylvania (based upon an equally divided court) which affirmed the second opinion of the Superior Court panel was entered on February 9, 1983. A timely application for reargument was filed pursuant to Pa. R.A.P. 2541 et seq., but it was denied by order dated March 28, 1983.

Jurisdiction to review said decision is vested in your Honorable Court by 28 U.S.C. §2101 (c). See also U. S. Supreme Court Rule 20.

CONSTITUTIONAL PROVISION

The case at bar involves the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, which reads as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This appeal relates to the effort of the plaintiffs (one a Canadian corporation and the other a New Jersey corporation) to invoke Pennsylvania's long-arm jurisdiction in order to seek redress against three defendants, two of which are Pennsylvania corporations and one of which is a Canadian corporation. The amended complaint avers that Kingsley and Keith (Canada) ordered 80,000 pounds of methylene chloride from Kingsley and Keith (New Jersey) on or about October 4, 1974, in order to fill a contract with Celanese (Canada). In order to fill this order, it is averred that Kingsley and Keith (New Jersey) thereafter ordered two tank cars of methylene chloride (approximately 40,000 pounds each) from Mercer International Corporation and arranged with H. M. Trimble & Sons, Limited (hereinafter referred to as Trimble) to transport said methylene chloride to Canada.[1]

The amended complaint further avers that, on or about October 12, 1974, Interstate Chemical Corporation, an affiliate of Mercer International Corporation, delivered a tank load of the said methylene chloride to Indianapolis, Indiana, for transferral into a Trimble tank truck. On or

[1] Trimble is a subsidiary of Trimac Transportation Ltd., a Canadian corporation. Other affiliate corporations within the Trimac Transportation System are Maccam Transport Ltd., Oil and Industry Suppliers Ltd., Municipal Tank Lines Ltd., Westland Carriers Ltd., Adby Transport Ltd., J. Kearns Transport Ltd., Mercury Tanklines Ltd., Territorial Transport Ltd., Tank Lines Ltd., and Columbia Bulk Carriers Ltd.

about November 12, 1974, it is averred that Interstate Chemical Corporation delivered a second tank load of methylene chloride to a Trimble tank truck in Mercer, Pennsylvania.

The amended complaint also avers that both tank trucks of methylene chloride were found to be contaminated upon delivery to Celanese (Canada), and damages are asserted for breach of the implied warranty of merchantability and the implied warranty of fitness for a particular purpose.

The only averment of the amended complaint which connects Trimble with the Commonwealth of Pennsylvania is the averment of paragraph 12, which states that a load of methylene chloride was delivered to a Trimble tank truck in Mercer, Pennsylvania, on or about November 12, 1974.

The pretrial discovery discloses that the Pennsylvania corporations named as defendants have had no business transactions with Trimble (or any other affiliate corporations within the Trimac Transportation System) except the business relationship arising under the order placed by the plaintiffs, that Trimble does not ship any merchandise directly or indirectly into or through the Commonwealth of Pennsylvania, and that Trimble has had no connection with the Commonwealth of Pennsylvania other than the load of methylene chloride which was picked up in Mercer, Pennsylvania, on or about November 12, 1974.

By order dated January 15, 1979, the Court of Common Pleas of Mercer County dismissed Trimble's preliminary objections under Pa. R.C.P. 1017 (b) (1) and granted the plaintiffs' petition for leave to invoke the substituted

service provisions of Pa. R.C.P. 2180(c). Trimble's motion for reconsideration was refused by order dated February 13, 1979; whereupon, Trimble lodged an appeal with the Superior Court of Pennsylvania.

By opinion and order filed on October 24, 1980 (as reported at 426 A.2d 618 but later withdrawn from publication), the three-judge Superior Court panel which heard the appeal reversed the Common Pleas order, on the ground that the record did not disclose that the cause of action arose from the Canadian defendant's activities within the forum state, and on the ground that there was insufficient showing that the Canadian defendant's contacts with Pennsylvania were "so continuous and substantial" as to justify the exercise of long-arm jurisdiction over a cause of action occurring beyond Pennsylvania's borders.

Upon the plaintiffs' application for reargument, the Superior Court entered an order on March 30, 1981, refusing reargument but allowing reconsideration by the three-judge panel. By opinion and order filed on June 26, 1981 (as reported at 291 Pa. Superior Ct. 96, 435 A.2d 585), the three-judge panel reversed itself, withdrew its earlier opinion and affirmed the Common Pleas order. Trimble's application for reargument was denied by order dated October 9, 1981; whereupon, Trimble filed a petition for allowance of appeal with the Supreme Court of Pennsylvania. Said petition was granted by order dated December 22, 1981, and oral argument was heard by the full seven-justice court on September 23, 1982.

Chief Justice O'Brien's term expired on December 31, 1982; hence, he did not participate in the decision an-

nounced on February 9, 1983. The remaining six justices were equally divided, with Mr. Justice Roberts (joined by Justices Larson and Flaherty) filing an opinion in support of affirmance, and Mr. Justice Nix (joined by Justices McDermott and Hutchinson) filing an opinion in the support of reversal. These opinions were accompanied by a per curiam order affirming the second opinion of the Superior Court on the ground that the Supreme Court was equally divided.

Trimble thereafter filed a timely application for reargument pursuant to Pa. R.A.P. 2541 et seq., but this was denied by order dated March 28, 1983. The issues being questions of constitutional dimension, and the decisional difficulties encountered by the Pennsylvania judges being traced to differing interpretations of prior decisions of your Honorable Court, Trimble now seeks a writ of certiorari so that full and fair analysis can be given to this long-arm controversy.

ARGUMENT

I. APPROPRIATENESS OF THREE-PRONGED TEST

In *International Shoe Co. vs. Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945), your Honorable Court proclaimed the "minimum contacts" test for determining whether a court may constitutionally exercise in personam jurisdiction over a non-resident defendant. This holding was recently reaffirmed in *World-Wide Volkswagen Corp. vs. Woodson*, 444 U.S. 286, 62 L.Ed. 2d 490, 100 S.Ct. 559 (1980), wherein your Honorable Court declared (at 444 U.S. 291-92):

> "As has long been settled, and as we reaffirm today, a state court may exercise personal jurisdiction over a non-resident defendant only so long as there exists 'minimum contacts' between the defendant and the forum State. . . . The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system."

In applying the constitutional standard, the Superior Court of Pennsylvania has adopted a three-pronged test for determining whether the requisite contacts are present for asserting long-arm jurisdiction. First, the defendant must

have purposefully availed itself of the privilege of acting within the forum state, thus invoking the benefits and protection of its laws. Secondly, the cause of action must arise from defendant's activities within the forum state. Thirdly, the acts of the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over it reasonable. See *Proctor & Schwartz, Inc. vs. Cleveland Lumber Co.*, 228 Pa. Superior Ct. 12, 323 A.2d 11 (1974).

In the opinion in support of reversal filed by three justices of the Pennsylvania Supreme Court in the case at bar, Mr. Justice Nix declares that "we are convinced that this three-pronged test represents workable guidelines in establishing whether there exist 'minimum contacts' among the defendant, the forum and the litigation." On the other hand, Mr. Justice Roberts declares in the opinion in support of affirmance that the three-pronged test is rigid and inappropriate. The resulting confusion will trouble not only the Pennsylvania courts, but also the courts of sister states, unless and until your Honorable Court addresses and resolves the issue.

A similar three-pronged test is in use in numerous jurisdictions. See *Southern Machine Co. vs. Mohasco Industries, Inc.*, 401 F.2d 374 (6th Cir. 1968); *Doyn Aircraft, Inc. vs. Wylie*, 443 F.2d 579 (10th Cir. 1971). See also *Note, Jurisdiction Over Nonresident Corporations Based on a Single Act: A New Sole for International Shoe*, 47 Geo. L. J. 342 (1958).

It is right and appropriate, therefore, that your Honorable Court grant certiorari so that the propriety of the three-pronged test can be finally determined.

Argument

II. APPLICATION OF SECOND PART OF THREE-PRONGED TEST

The second part of the three-pronged test requires that the plaintiff's cause of action must arise from the defendant's activities within the forum state. This requirement is derived from *International Shoe Co. vs. Washington*, supra, wherein your Honorable Court sanctioned the right of a state to require a non-resident to respond in its courts as to obligations which "arise out of or are connected with the activities within the state." 326 U.S. at 319. Accordingly, irrespective of the appropriateness of the three-pronged test as a whole, it is apparent that the second part is constitutionally mandated.

In applying the second part of the three-pronged test, the three-judge Superior Court panel in the case at bar stated that it is sufficient for the plaintiff to plead a contract having a "significant connection" with Pennsylvania, and a breach of that contract. The panel quickly acknowledged, however, that "it may be argued that this is too broad a reading" of the constitutional standard. *Kingsley & Keith Ltd. vs. Mercer International Corp.*, 291 Pa. Superior Ct. 96, 435 A.2d 585, 591 (1981).

The Pennsylvania Supreme Court's opinion in support of reversal rejects the foregoing interpretation for three reasons. First, the "significant connection" test creates a distinction between assumpsit actions and trespass actions which is constitutionally unacceptable. Secondly, such an interpretation ignores the situs of the alleged breach and would require no tangible contact with

the forum state. Thirdly, the interpretation fails to delineate guidelines which would enable the Pennsylvania courts to determine which out-of-state contracts have a "significant connection" with Pennsylvania and which do not.

Turning to the facts in the case at bar, the Pennsylvania Supreme Court's opinion in support of reversal then concludes that the second part of the three-pronged test has not been met. Specifically, the opinion states (at 456 A.2d 1339):

> "The mere fact that the contract caused one of the shipments to be picked up in Pennsylvania, absent an allegation that the breach occurred during the sojourn in Pennsylvania, fails to meet the requisite contact under this prong of the test. Nor can this deficiency be ignored simply because appellees are unable to determine where the breach occurred."

It has been held that the "significant connection" concept has no application where the contract in question was neither solicited, negotiated, nor executed in the forum state and where only a small part of the total performance would involve the forum state. See *Iowa Electric Light & Power Co. vs. Atlas Corp.*, 603 F.2d 1301 (8th Cir. 1979), *cert. denied*, 445 U.S. 911, 63 L.Ed. 2d 327, 100 S.Ct. 1090 (1980).

Attention is also directed to *Carty vs. Beech Aircraft Corp.*, 679 F.2d 1051 (3d Cir. 1982), wherein it was held that, in the commercial context, the cause of action arises for jurisdictional purposes where the property has been damaged. Further, in *Kenny vs. Alexson Equipment Co.*,

495 Pa. 107, 432 A.2d 974 (1981), it was held that a single transaction is insufficient to meet the "minimum contacts" test unless the seller has purposely engaged in continuous distribution activity within the forum state.

Accordingly, it is submitted that the mere averment of a contract having a "significant connection" with Pennsylvania is insufficient to satisfy the second part of the three-pronged test. Moreover, the plaintiff in the case at bar being unable to aver that the alleged contamination occurred within Pennsylvania or that the non-resident defendant had purposely engaged in continuous distribution activity within Pennsylvania, it is submitted that the "minimum contacts" requirement for the exercise of long-arm jurisdiction has not been met. Certiorari should be granted, therefore, so that the "significant connection" concept can be further analyzed and clarified.

III. APPLICATION OF "CONTINUOUS AND SUBSTANTIAL" TEST

In *Bork et ux. vs. Mills*, 458 Pa. 228, 329 A.2d 247 (1974), the Pennsylvania Supreme Court held that, where the complaint suggests on its face that the cause of action occurred beyond Pennsylvania's borders, the plaintiff must show more than "minimum contacts" in order to obtain jurisdiction over a non-resident defendant. In this situation, the plaintiff must show that the non-resident defendant's contacts with Pennsylvania are "so continuous and substantial as to make it reasonable" for the Pennsylvania courts to exercise long-arm jurisdiction.

Argument

The "continuous and substantial" test is nothing peculiar to Pennsylvania. Indeed, it is derived from the holding of your Honorable Court in *Perkins vs. Benguet Consolidated Mining Co.*, 342 U.S. 437, 96 L.Ed. 485, 72 S.Ct. 413 (1952); and it appears in Section 35(3) of the Restatement (Second) of Conflict of Laws.

A cause of action arising out of non-forum-related activity was at issue in *Reliance Steel Products Co. vs. Watson, Ess, Marshall & Enggass*, 675 F.2d 587 (3d Cir. 1982). In rejecting long-arm jurisdiction, the court declared that the proof required to meet the "continuous and substantial" test must be "extensive and persuasive."

In the case at bar, the plaintiff has shown nothing which could be considered "extensive and persuasive" concerning the non-resident defendant's contacts with the forum state. Indeed, the plaintiff has shown absolutely no contacts between the non-resident defendant and Pennsylvania with regard to the load of methylene chloride which was picked up in Indianapolis, Indiana. As to the load of methylene chloride which was picked up in Mercer, Pennsylvania, the plaintiff has shown only that one of the non-resident defendant's trucks used Pennsylvania highways in order to transport to a Canadian destination the subject matter of a contract between two other Canadian corporations. The plaintiff avers that this load of methylene chloride was found to be contaminated upon arrival at the Canadian destination, but it is unable to aver that the contamination occurred in Pennsylvania. It is just as probable, of course, that the contamination occurred in Canada or in any of the other states through which the truck passed.

In concluding that the plaintiff has not met the "continuous and substantial" test, the Pennsylvania Supreme Court's opinion in support of reversal states (at 456 A.2d 1339-40):

> "The record discloses that except for the single entry into Pennsylvania, Trimble Canada has had absolutely no contacts, ties or relations within this Commonwealth. In the absence of facts showing Trimble Canada's activities in Pennsylvania to be continuous and substantial, jurisdiction over appellant, Trimble Canada may not be asserted consistent with due process."

Certiorari should be granted, therefore, so that the *Perkins* holding can be authoritatively interpreted in this multi-contract transportation context.

IV. APPLICATION OF THIRD PART OF THREE-PRONGED TEST

The third part of the three-pronged test requires that the acts of the non-resident defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over it reasonable. In this regard, reference is made to *World-Wide Volkswagen Corp. vs. Woodson*, supra, wherein your Honorable Court declared (at 444 U.S. 297):

> ". . . the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and con-

> nection with the forum State are such that he should reasonably anticipate being haled into court there. . . . The Due Process Clause, by insuring the 'orderly administration of the laws,' . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."

In this regard, it must be noted that the convenience of the parties and the interest of the forum state are secondary factors. Prime factors are the quality and quantity of the non-resident's contacts with the forum state and the relationship of the cause of action to these contacts. See *Aftanase vs. Economy Baler Co.*, 343 F.2d 187, 197 (8th Cir. 1965) (Blackman, J.); *Rosen vs. Solomon*, 374 F. Supp. 915 (E.D. Pa. 1974).

Furthermore, it has been held that, in a breach of contract situation, long-arm jurisdiction must be based upon a showing that the contract "clearly and expressly contemplated and required performance" in the forum state. See *Bross Utilities Service Corp. vs. Aboubshait*, 489 F. Supp. 1366, 1372 (D. Conn. 1980), *aff'd*, 646 F.2d 559 (2d Cir. 1980).

The Pennsylvania Supreme Court's opinion in support of affirmance filed in the case at bar overlooks the fact that the non-resident defendant had absolutely no contact with Pennsylvania with respect to the load of methylene chloride picked up in Indiana. As to this load, it could not possibly be reasonable for the non-resident defendant to have anticipated that it might be "haled into

court" in Pennsylvania. See *Shern vs. Tractor Supply Co. of Grand Forks,* 381 F. Supp. 1331, 1336 (D. N.D. 1974). As to the load of methylene chloride picked up in Pennsylvania, perhaps it would have been reasonable for the non-resident defendant to have anticipated that it might be "haled into court" in Pennsylvania should a vehicular accident occur therein. It would not be reasonable, however, for said defendant to anticipate that it could be "haled into court" in Pennsylvania in connection with a claim of contamination occurring in Canada or in some other state through which the truck passed. See *Nissley vs. JLG Industries, Inc.,* Pa. Superior Ct. , 452 A.2d 865 (1982). In short, Pennsylvania is not a "fair forum" for the adjudication of a breach of contract cause of action occurring beyond Pennsylvania's borders. See *Kulko vs. California Superior Court,* 436 U.S. 84, 100, 56 L.Ed. 2d 132, 146, 98 S.Ct. 1690 (1978).

V. PENNSYLVANIA'S INTEREST IN ADJUDICATING A DISPUTE BETWEEN FOREIGN CORPORATIONS

In *Image Ten, Inc. vs. Walter Reade Organization, Inc.,* 456 Pa. 485, 322 A.2d 109 (1974), the Pennsylvania Supreme Court stated that the purpose of the Pennsylvania long-arm statute is "to provide an appropriate forum for *citizens* to seek redress for harm caused by foreign corporations which have availed themselves of the privilege of 'doing business' in this Commonwealth. . . ." (Emphasis added.)

Argument

The policy favoring citizens over non-citizens when it comes to access to a judicial forum was emphasized in *Columbia Metal Culvert Co. vs. Kaiser Industries Corp.*, 526 F.2d 724, 730 (3d Cir. 1975). It was there stated that Pennsylvania's interest in adjudicating a dispute is much less compelling where none of its citizens is seeking redress, but where a foreign corporation is seeking to use Pennsylvania's long-arm jurisdiction in order to reach another foreign corporation. See also *Crompton vs. Park Ward Motors, Inc.*, 299 Pa. Superior Ct. 40, 445 A.2d 137 (1982), wherein the court indicated that Pennsylvania has little interest in adjudicating a dispute arising under an out-of-state contract, even though it affects a Pennsylvania resident, where the conduct in question occurred beyond Pennsylvania's borders.

If Pennsylvania has an interest in the resolution of a breach of contract dispute between two Canadian corporations concerning the transportation of several loads of methylene chloride from the United States to Canada (one of which involves the use of Pennsylvania highways), then Pennsylvania could be said to have an interest in resolving any multi-state breach of contract case where even slight performance under the contract touches Pennsylvania. Such a result, it is submitted, is neither fair nor reasonable under the constitutional standard. See *World-Wide Volkswagen Corp. vs. Woodson*, supra, wherein your Honorable Court declared that Oklahoma had no legitimate interest in providing a forum for New York residents to bring a products liability action against non-resident sellers of automobiles.

It must be noted that there is no allegation in the record in the case at bar that the non-resident defendant's

transportation of the one load of methylene chloride over Pennsylvania highways in any way exposed Pennsylvania residents to danger. How is it, then, that the Pennsylvania Supreme Court's opinion in support of affirmance could assert that Pennsylvania has an interest in assuring the safe transportation of goods over its highways? Nor is there any allegation in the record that the non-resident defendant breached a contractual undertaking with a Pennsylvania domiciliary. The contract with Mercer International Corporation and Interstate Chemical Corporation, the Pennsylvania defendants, was solely the making of the Canadian plaintiff. After this contract was entered into, the plaintiff contracted with Trimble, the Canadian defendant, to transport the subject matter thereof from a point in Pennsylvania and a point in Indiana to a specified Canadian destination. As between the Canadian defendant and the two Pennsylvania defendants, there was no contract and no possibility of a breach of contract dispute. How is it, then, that it could be asserted that Pennsylvania has an interest in assuring that Pennsylvania manufacturers do not bear unwarranted liability? The Pennsylvania courts can properly adjudicate any liability claims against Pennsylvania manufacturers without becoming entangled in collateral disputes relating to out-of-state transportation contracts.

CONCLUSION

For the reasons set forth above, it is submitted that your Honorable Court should grant certiorari. A delicate matter of constitutional law is at issue, and it has greatly

troubled the Pennsylvania judges. The Common Pleas judge sustained the exercise of long-arm jurisdiction; the three-judge Superior Court panel initially reversed in a unanimous opinion; upon reconsideration, the panel reversed itself and unanimously affirmed the Common Pleas decision; the Pennsylvania Supreme Court allowed an appeal; but the second Superior Court opinion was affirmed because the justices of the Supreme Court were equally divided. It is obvious that further guidance is needed from your Honorable Court as to the breach of contract aspects of long-arm jurisdiction.

The first issue to be addressed is the propriety of the three-pronged test adopted by the Superior Court of Pennsylvania and numerous other jurisdictions. The Pennsylvania Supreme Court's opinion in support of affirmance refers to the test as inappropriate and rigid.

Secondly, it is submitted that the Pennsylvania Supreme Court's opinion in support of reversal is correct in its conclusion that the mere pleading of a contract having a "significant connection" with Pennsylvania is constitutionally insufficient to meet the "minimum contacts" standard, and in its conclusion that the non-resident defendant's one trip into Pennsylvania was insufficient to meet the "continuous and substantial" test for adjudicating liability under a cause of action occurring beyond Pennsylvania's borders.

Finally, it is submitted that the Pennsylvania Supreme Court's opinion in support of affirmance misapprehended Pennsylvania's interest in adjudicating the breach of contract dispute raised in the case at bar. The case involves a Canadian corporation seeking redress against another

Canadian corporation with regard to a contractual undertaking entered into in Canada and calling for ultimate performance in Canada. Moreover, of the two trucks in question, one of them never touched Pennsylvania soil in any respect. It would be unreasonable and offensive to the due process standard, therefore, for Pennsylvania to exercise long-arm jurisdiction over the Canadian defendant.

Wherefore, Trimble prays that your Honorable Court grant its petition for a writ of certiorari so that these issues can be fully and fairly analyzed.

CUSICK, MADDEN, JOYCE AND
McKAY

By P. RAYMOND BARTHOLOMEW
Attorneys for Petitioner

APPENDIX

KINGSLEY AND KEITH (CANADA) LIMITED and Kingsley and Keith Chemical Corporation

v.

MERCER INTERNATIONAL CORPORATION and Interstate Chemical Corporation and H.M. Trimble & Sons, Limited

Appeal of H.M. TRIMBLE & SONS, LIMITED

SUPREME COURT OF PENNSYLVANIA

Argued Sept. 23, 1982
Decided Feb. 9, 1983

Reargument Denied March 28, 1983
[456 A.2d 1333]

ORDER

PER CURIAM.

The Court being equally divided, the Order of the Superior Court is affirmed.

ROBERTS, C.J., files an opinion in support of affirmance in which LARSEN and FLAHERTY, JJ., join.

NIX, J., files an opinion in support of reversal in which McDERMOTT and HUTCHINSON, JJ., join.

O'BRIEN, former C.J., did not participate in the decision of this case.

OPINION IN SUPPORT OF AFFIRMANCE

ROBERTS, Chief Justice.

The record amply supports the order of the Court of Common Pleas of Mercer County sustaining its exercise of jurisdiction over appellant, H.M. Trimble & Sons, Limited. As the Opinion in Support of Reversal acknowledges, appellant "purposely availed itself of the privilege of conducting activities within the forum state" by partially performing the contract with appellees in Pennsylvania. Appellant entered into a contract to transport goods manufactured in Pennsylvania from Pennsylvania to Canada. In order to take custody of the goods in Pennsylvania, appellant entered into a "trip lease" of its equipment with Coastal Tanklines, Limited, which authorized appellant to enter Pennsylvania for that purpose. Compare *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed. 2d 490 (1980), and *Kenny v. Alexson Equipment Co.*, 495 Pa. 107, 432 A.2d 974 (1981) (jurisdiction inappropriate where defendant's contact with forum is fortuitous). The state's interest in assuring that a contract for the safe transportation of Pennsylvania goods is properly performed must be evident. Not only does Pennsylvania have an interest in highway safety; it also has an interest in assuring that Pennsylvania manufacturers do not bear unwarranted liability for goods proper when made and delivered to the buyer's carrier. See *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed. 2d 223 (1957).

Contrary to the assertion of the Opinion in Support of Reversal, it must be obvious that the reasonableness of asserting jurisdiction over a particular defendant is not

properly determined by the existence or non-existence of a mere allegation in the plaintiff's complaint of the situs of a claimed breach of contract. Indeed, in this case, appellee's claim against appellant for the improper carriage of goods does not even require proof that appellant's alleged contamination of the goods "occurred during [appellant's] sojourn in Pennsylvania," which, according to the Opinion in Support of Reversal, would be a necessary allegation for the exercise of jurisdiction. All appellee must prove is that the goods were contaminated when appellant made the delivery in Canada and that the goods had been in a satisfactory condition when appellant assumed custody in Pennsylvania. While the situs of an alleged breach, if known, is relevant to a jurisdictional inquiry, it is only one of many potential contacts between the defendant, the forum, and the litigation which may support jurisdiction.[1]

It is not unfair to require appellant, a Canadian-based carrier, to defend in a Pennsylvania court in an action for breach of contract instituted by the Canadian buyer against both the carrier and the Pennsylvania manufacturer who supplied the goods which the carrier contracted to transport from Pennsylvania to Canada. As the

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[1] The inappropriateness of the rigid, "three-pronged test" employed by the Opinion in Support of Reversal is evidenced by the results of the test as applied to this case. Rather than properly analyzing the reasonableness of jurisdiction in light of all relevant contacts between the defendant, the forum, and the litigation, see *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), the Opinion in Support of Reversal deems controlling only one potential contact, the "situs" of the alleged contractual breach.

Supreme Court of the United States stated in *International Shoe,*

> "to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are *connected with the activities within the state,* a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue."

International Shoe Co. v. Washington, 326 U.S. 310, 319, 66 S.Ct. 154, 160, 90 L.Ed. 95 (1945) (emphasis supplied).[2] Accordingly, Pennsylvania's exercise of jurisdiction over appellant meets the requirements of due process, and the order of the Superior Court, 291 Pa. Super. 96, 435 A.2d 585, must be affirmed.

LARSEN and FLAHERTY, JJ., join in this opinion in support of affirmance.

OPINION IN SUPPORT OF REVERSAL

NIX, Justice.

In the present appeal, we are confronted with the issue of whether the exercise of "long-arm" jurisdiction over a foreign corporation, whose only contact with the

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[2] The emphasis supplied is also supplied by the Opinion in Support of Reversal in quoting *International Shoe;* yet, remarkably, that opinion fails to consider the very language which it has emphasized.

Commonwealth of Pennsylvania was the partial performance of a contract which was entered into in Canada by the foreign corporation and another Canadian corporation, violates the due process clause of the Fourteenth Amendment. A chronology of the pertinent facts is requisite.

Kingsley and Keith Ltd. (Kingsley Canada), a Canadian corporation, ordered approximately 80,000 pounds of methylene chloride from Kingsley and Keith Chemical Corporation (Kingsley New Jersey), a New Jersey corporation, pursuant to a supply contract with Celanese Ltd.,[1] another Canadian corporation to which ultimate delivery was to be made. On October 10, 1974, Kingsley New Jersey ordered two tank cars (approximately 40,000 pounds each) from Mercer International Corporation (Mercer Penna.),[2] a Pennsylvania corporation.

The contract for delivery of the methylene chloride was entered into between the Montreal office of Kingsley Canada and H.M. Trimble & Sons, Ltd., a Canadian corporation (Trimble Canada).[3] Interstate Chemical Corporation (Interstate Penna.), a Pennsylvania corporation,

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[1] Celanese Ltd. is not a party to the instant litigation.

[2] Mercer International Corporation and Interstate Chemical Corporation, another Pennsylvania corporation, are affiliated corporations doing business in Mercer, Pennsylvania.

[3] H.M. Trimble & Sons is one of several affiliated corporations within the Trimac Transportation System, a Canadian corporation. Although Trimac was originally listed as a defendant, it became known later that the contract for delivery was entered into and performed by Trimble. A stipulation was entered into naming Trimble as a defendant, rather than Trimac, and all pleadings and documents pertinent to the litigation referring to Trimac are to be construed to mean Trimble Canada.

was to provide the methylene chloride. On October 12, 1974, a tank truck of Interstate Penna. delivered approximately 40,000 pounds (½) of the methylene chloride for transfer to a tank truck of Trimble Canada in Indianapolis, Indiana, which in turn was to be delivered to Celanese in Canada.

On November 12, 1974, a second tank truck of Interstate Penna. transferred the remaining half of the methylene chloride (approximately 40,000 pounds) to a Trimble Canada tank truck in Mercer, Pennsylvania which load was also to be delivered to Celanese in Canada.

Upon arrival, testing and inspection in Canada, Celanese rejected the methylene chloride claiming that it was contaminated. Kingsley Canada and Kingsley New Jersey thereafter filed suit in the Court of Common Pleas of Mercer County against Mercer Penna., Interstate Penna. and Trimble Canada

The causes of action against Mercer Penna. and Interstate Penna., as reflected in the amended complaint in assumpsit, assert breaches of implied warranties of merchantability and fitness for intended purpose concerning the methylene chloride. In addition, the amended complaint contains a separate count against Interstate Penna. for its transporting of the tank load of methylene chloride to Indianapolis, Indiana, where it was then transferred to a Trimble Canada tank car. The cause of action asserted against Trimble Canada claims a breach of contract to transport and deliver, alleging that Trimble Canada failed to take proper steps to avoid contamination of the methylene chloride.

Trimble Canada filed preliminary objections raising, *inter alia*, the question of jurisdiction of the Pennsylvania courts. Subsequently, Kingsley Canada and Kingsley New Jersey filed an amended complaint and after hearing, dated January 15, 1979, the Court of Common Pleas dismissed the preliminary objections and granted leave to the plaintiffs to serve the amended complaint at the home office of Trimble Canada by registered mail.[4]

On appeal, a panel of the Superior Court initially reversed the order of the Court of Common Pleas, holding that Trimble Canada's activities within Pennsylvania were insufficient to support jurisdiction.

Upon application of plaintiff-appellees for reargument, the Superior Court entered an order denying reargument but granting reconsideration. By opinion[5] and order filed on June 26, 1981, the three-judge panel reversed its position and affirmed the Court of Common Pleas, holding Trimble Canada amenable to the jurisdiction of the Pennsylvania courts.

In *Kenny v. Alexson Equipment Co.*, 495 Pa. 107, 432 A.2d 974 (1981) this Court recently set forth the

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[4] The authority for this service may be found in Pa. R.C.P. R. 2180(c), which provides:

> If service cannot be made under any of the methods set forth in subdivision (a) or (b) of this rule, the court upon petition shall authorize service by registered mail directed to the Secretary of the Commonwealth and to the corporation or similar entity at its last registered address or principal place of business, or by publication as the court may direct.

[5] *Kingsley and Keith, Ltd. v. Trimble*, 291 Pa. Superior Ct. 96, 435 A.2d 585 (1981).

parameters of the Fourteenth Amendment's due process limitation on a state's exercise of *in personam* jurisdiction over a non-resident defendant.

> It is well settled that a state court may exercise personal jurisdiction over a non-resident defendant only so long as there exist "minimum contacts" between the defendant and the forum state. *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). The due process clause "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties or relations." *Id.* at 319, 66 S.Ct. at 159, 90 L.Ed. at 104. This requirement is based on the proposition that maintenance of suit against a non-resident defendant must not offend traditional notions of "fair play and substantial justice." *International Shoe, supra.* [Footnote omitted]

Id. at 117-18, 432 A.2d at 980.

The Superior Court, in the instant appeal, applied a three-pronged test to determine whether Trimble Canada possessed the requisite "minimum contacts" with Pennsylvania. This test,[6] first enunciated in *Southern Machine*

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[6] A similar three-pronged test has been adopted by numerous jurisdictions. *See, e.g., Doyn Aircraft, Inc. v. Wylie*, 443 F.2d 579 (10th Cir. 1971); *Aftanase v. Economy Baler Co.*, 343 F.2d 187 (8th Cir. 1965); *Kourkene v. American B.B.R., Inc.*, 313 F.2d 769 (9th Cir. 1963); *L.D. Reeder Contractors of Arizona v. Higgins Ind.*, 265 F.2d 768 (9th Cir. 1959); *White v. Goldthwaite*, 204 Kan. 83, 460 P.2d 578 (1969); *Tyee Construction Co. v. Dulien Steel Products, Inc. of Washington*, 62 Wash.2d 106,

Co. v. Mohasco Industries, Inc., 401 F.2d 374 (6th Cir. 1968) and adopted by the Superior Court in *Proctor & Schwartz v. Cleveland Lumber Co.*, 228 Pa. Superior Ct. 12, 323 A.2d 11 (1974) provides:

> First, the defendant must have purposefully availed itself of the privilege of acting within the forum state thus invoking the benefits and protections of its laws. *Hanson v. Denckla*, [357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed. 2d 1283 (1958)]. Secondly, the cause of action must arise from defendant's activities within the forum state. *See Southern Mach. Co v. Mohasco Indus., Inc.*, 401 F.2d 374 (6th Cir. 1968); *Electric Regulator Corp. v. Sterling Extruder Corp.*, 280 F. Supp. 550 (D. Conn. 1968). Lastly, the acts of the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over it reasonable. *International Shoe Co. v. Washington, supra; see Southern Mach. Co. v. Mohasco Indus., Inc., supra* [401 F.2d 374 (6th Cir. 1968)]; *see also In-Flight Devices Corp. v. Van Dusen Air, Inc.* 466 F.2d 220 (6th Cir. 1972); *Kourkene v. American BBR, Inc.*, 313 F.2d 769 (9th Cir. 1963).

Id. 228 Pa. Super. at 19, 323 A.2d at 15.

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381 P.2d 245 (1963). In addition, Southern Machine has been followed in: *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220 (6th Cir. 1972); *King v. Hailey Chevrolet Co.*, 462 F.2d 63 (6th Cir. 1972); *Hill v. Smith*, 337 F. Supp. 981 (W.D. Mich. 1971). *See also* Note, Jurisdiction Over Nonresident Corporations Based on a Single Act: A New Sole for International Shoe, 47 Geo. L.J. 342 (1958).

A number of commentators have submitted that the three-pronged test represents appropriate guidelines, based on the reasoning of *International Shoe* and its progeny, against which due process should be analyzed. *See, e.g.*, Comment, *Pennsylvania's New Long-Arm Statute*, 79 Dick. L. Rev. 51, 77 n. 136 (1974); Note, *Jurisdiction Over Nonresident Corporations Based on a Single Act: A New Sole for International Shoe*, 47 Geo. L.J. 342 (1958).

In *Kenny v. Alexson Equipment Co., supra*, this Court held that the non-resident defendant had not purposefully availed himself of the privilege of conducting activities within Pennsylvania and thus could not be rendered amenable to *in personam* jurisdiction consistent with due process. It was therefore unnecessary for us to decide what, if any, additional guidelines should be addressed. In the instant appeal, Trimble Canada implicitly concedes that, through its entering into Pennsylvania to partially perform the delivery contract, it purposely availed itself of the privilege of conducting activities within the forum state. We are therefore required to determine what other factors are necessary to insure that due proces is satisfied before personal jurisdiction may be asserted. After careful review, we are convinced that this three-pronged test represents workable guidelines in establishing whether there exist "minimum contacts" among the defendant, the forum and the litigation.

The second prong requires that "the cause of action must arise from defendant's activities within the forum state." This requirement is derived from *International Shoe, supra*, wherein the United States Supreme Court noted:

> . . . [T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations *arise out of or are connected with the activities within the state,* a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue. [Emphasis added.]

326 U.S. at 319, 66 S.Ct. at 160.

One commentator has suggested that the activities of the non-resident defendant are related to the cause of action when there exists "substantive relevance" between the facts constituting the forum contact and the facts required to prove the substantive cause of action. 1980 *Supreme Court Review* at 82.

> The test can be illustrated by the facts of *Peters v. Robin Airlines,* 281 A.D. 903 (2d Dept. 1953). A New York statute purported to grant jurisdiction over operators of aircraft in collision litigation if the craft had landed at or departed from a New York airfield. In a brief opinion, the *Peters* court refused to apply the statute because the New York stopover did not contribute to the crash. The stopover was of no substantive relevance to the dispute, since the complaint did not allege that the collision was due to negligent operation or maintenance there. For this reason, it should be categorized as an unrelated contact. [Footnotes omitted.]

Id. at 84.

The purpose of the second prong, as it relates to substantive relevance, is to insure that the acts of the nonresident defendant within the forum state represent the factual predicates upon which a cause of action are to be based. Without this requirement, the nexus between the defendant's activities, the cause of action and the forum state have not been established. Such a causal connection is critical to the assertion of long-arm jurisdiction.

In the Superior Court opinion in the instant case, Judge Spaeth, writing for the panel, explained the second prong of the minimum contacts test as follows:

> As we read it, the second part of the . . . test may be satisfied by pleading a contract having a significant connection with Pennsylvania . . . and a breach of that contract. We recognize that it may be argued that this is too broad a reading. [Citation omitted.]

291 Pa. Superior Ct. at 108, 435 A.2d at 591.

This interpretation of the second prong of the test must be rejected for several reasons. First, the language, requiring only that the contract have a significant connection with the forum and a breach of that contract, is vague and fails to delineate definitive guidelines in order to determine when a significant connection exists.

Equally important, where, as here, the situs of the breach is critical, such an interpretation ignores the nonresident defendant's activities in the forum state in this regard. Finally, implicit in the Superior Court's interpretation of the second prong in the instant case, is the creation of an unacceptable distinction between actions in as-

sumpsit and those in trespass for purposes of asserting constitutionally permissible long-arm jurisdiction.[7]

As applied to the facts of the instant case, it is evident the second prong of the jurisdictional test has not been met. It must be remembered that there are two separate and distinct contracts involved in this litigation. The foreign plaintiffs are suing the Pennsylvania defendants on an alleged breach of contract and warranties due to the methylene chloride's contamination upon delivery. The second contract, the focus of the instant jurisdictional controversy, was negotiated and entered into by and between Kingsley Canada and Trimble Canada. This contract contemplated two shipments of methylene chloride. The first shipment to be picked up by Trimble Canada in Indianapolis, Indiana, the second shipment to be picked up by Trimble Canada in Pennsylvania. The mere fact that the

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[7] The Superior Court in its opinion emphasized in its cited cases distinctions between actions in assumpsit and actions in trespass. We believe that the analysis of whether minimum contacts exist is to be determined solely on the basis of those facts tending to establish the required relationships between the nonresident defendant's activities, the cause of action and the forum. Although the facts as averred in a contract action may be different than those averred in a tort action, it cannot be said that an alternative standard of minimum contacts is required in one as opposed to the other. *See, e.g.*, D. Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. Ill. L.F. 533. "To vary the minimum contacts needed for jurisdiction according to the character of the suit would lead plaintiff into disingenuous manipulation of their pleadings, and it would plunge the courts into ever more difficult refinements of the categories." *Vencedor Mfg. Co., Inc. v. Gougler Industries*, 557 F.2d 886, 894 (1st Cir. 1977).

contract caused one of the shipments to be picked up in Pennsylvania, absent an allegation that the breach occurred during the sojourn in Pennsylvania, fails to meet the requisite contact under this prong of the test. Nor can this deficiency be ignored simply because appellees are unable to determine where the breach occurred.

Standing alone, the mere contemplation under the terms of the contract of partial performance in the forum state does not provide that state with a significant interest in the litigation. Similarly, the instant case is not one wherein the state has a manifest interest in providing effective means of redress for its residents. *McGee v. International Life Ins., supra.* Thus having concluded that the second prong of the test has not been met, we need not inquire into the third prong.

However, even when the three pronged test cannot be satisfied, jurisdiction, nevertheless, may be found where the nonresident's activities in the forum state are "so continuous and substantial as to make it reasonable" to require the non-resident defendant to submit to the jurisdiction of the Pennsylvania courts. *Bork v. Mills,* 458 Pa. 228, 232, 329 A.2d 247, 249 (1974); *see also Kenny v. Alexson Equipment Co., supra.* The record discloses that except for the single entry into Pennsylvania, Trimble Canada has had absolutely no contacts, ties or relations within this Commonwealth. In the absence of facts showing Trimble Canada's activities in Pennsylvania to be continuous and substantial, jurisdiction over appellant, Trimble Canada may not be asserted consistent with due process.

Accordingly, the Order of the Superior Court should be reversed and the complaint against appellant Trimble Canada dismissed.

McDERMOTT and HUTCHINSON, JJ., join in this opinion.

KINGSLEY AND KEITH (CANADA) LIMITED and Kingsley and Keith Chemical Corporation

v.

MERCER INTERNATIONAL CORPORATION and Interstate Chemical Corporation and H. M. Trimble & Sons, Limited

Appeal of H. M. TRIMBLE & SONS, LIMITED

SUPERIOR COURT OF PENNSYLVANIA
Argued Nov. 13, 1979
Filed June 26, 1981
Reargument Denied Oct. 9, 1981
Petition for Allowance of Appeal
Granted Dec. 22, 1981
[291 Pa. Superior Ct. 96, 435 A.2d 585]

Before SPAETH, HOFFMAN and VAN der VOORT, JJ.

SPAETH, Judge:

This case, one of a trilogy of long-arm jurisdiction cases,[1] is an appeal from an order granting a petition by

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[1] The other cases are *The Union National Bank of Pittsburgh v. L.D. Pankey Institute*, 284 Pa. Super. 537, 426 A.2d 624 (1980), and *Goff v. Armbrecht Motor Truck Sales, Inc.*, 284 Pa. Super. 544, 426 A.2d 628 (1980). Originally all three cases were decided and filed together, but upon application in this case, we granted reconsideration.

Kingsley and Keith (Canada), Limited, and Kingsley and Keith Chemical Corporation for leave to serve an amended complaint in assumpsit on H.M. Trimble and Sons, Limited, by registered mail to Trimble's headquarters in Canada.[2]

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For the purposes of our inquiry, we shall accept as true the well-pleaded facts in the amended complaint. *Cf. Frisch v. Alexson Equip. Corp.*, 423 Pa. 247, 224 A.2d 183 (1966).[3] So regarded, the amended complaint may be summarized as follows.

In 1974, one Canadian corporation, Celanese (Canada), Limited, ordered approximately 80,000 lbs. of methylene chloride from another Canadian corporation, Kings-

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[2] The authority for this service may be found in Pa. R. Civ. P., R. 2180(c), which provides:

> If service cannot be made under any of the methods set forth in subdivision (a) or (b) of this rule, the court upon petition shall authorize service by registered mail directed to the Secretary of the Commonwealth and to the corporation or similar entity at its last registered address or principal place of business, or by publication as the court may direct.

[3] In other words, Trimble's argument that the petition for leave to serve it should not have been granted is functionally equivalent to a defendant's argument that its preliminary objections to the complaint should be sustained. In both cases the assertion is that the complaint itself discloses that the action may not be maintained. A party making this assertion must take the complaint at face value. In this regard, it may be noted that the original complaint named Trimac Limited, as a defendant, Trimac Limited is Trimble's parent company. When it filed preliminary objections, as amended complaint was filed, naming Trimble instead of Trimac Limited as a defendant.

ley and Keith (Canada), Limited. Kingsley and Keith (Canada) ordered the methylene chloride from Kingsley and Keith Chemical Corporation, a New Jersey corporation, which in turn ordered two tanks of methylene chloride (approximately 40,000 lbs. each) from Mercer International Corporation, a Pennsylvania corporation. Kingsley and Keith (Canada) then arranged with H. M. Trimble and Sons, Limited, a Canadian corporation, to have the tanks transported to Canada. In October 1974, Interstate Chemical Corporation, a Pennsylvania corporation and an affiliate of Mercer International Corporation, sent one tank truck of the methylene chloride to Indianapolis, for transferral there to a Trimble tank truck. In November 1974, Interstate sent another tank truck of the methylene chloride to Mercer, Mercer County, Pennsylvania, for transferral there to a Trimble tank truck. Trimble delivered both tank loads to Celanese (Canada), but Celanese rejected them because the methylene chloride was contaminated. Kingsley and Keith (Canada) and Kingsley and Keith (New Jersey) thereupon brought the present action in Mercer County against Mercer International, Interstate, and Trimble. Generally stated, the allegation is that Mercer International, Interstate, and Trimble were obliged to deliver good methylene chloride to the two Kingsley and Keiths, so that the two Kingsley and Keiths could deliver it to Celanese, but instead delivered contaminated methylene chloride.

While all this seems complicated, it really is not. Plainly, both Mercer International and Interstate, as Pennsylvania corporations, may be sued in Pennsylvania, and no one contends otherwise; the issue is whether Trimble, a Canadian corporation, may be. This issue may be stated

as follows: When a Canadian common carrier (Trimble) contracts with another Canadian corporation (Kingsley and Keith) (Canada) to pick up one load of methylene chloride in Indiana and another load in Pennsylvania, and delivers both loads in Canada to a third Canadian corporation, does it acquire sufficient minimum contacts with Pennsylvania to render it amenable to suit in Pennsylvania in an action in which breach of the contract of carriage is alleged and in which the Pennsylvania sellers of both loads of methylene chloride are also defendants?

Answers to interrogatories revealed the following. Trimble did not receive a bill of lading from Mercer International, although it should have been the delivery carrier designated on the bill of lading. Trimble did not have authority either from the Pennsylvania Public Utility Commission or the Interstate Commerce Commission to pick up or deliver goods in Pennsylvania; the authority under which the methylene chloride was picked up in Pennsylvania was a "trip-lease" between Coastal Tanklines Limited and Trimble. Prior to the transactions involved here, Mercer International and Interstate had not requested or paid for Trimble's services, nor had they had any business relationship with Trimble.

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Before a court in this state may exercise jurisdiction over Trimble, it must appear that Trimble's conduct was within the provisions of this state's long-arm statute, and that application of the statute to Trimble would not violate the due process clause of the Fourteenth Amendment of the United States Constitution. *Monroeville Land Co., Inc. v. Sonnenblick-Goldman Corp. of Western Pa.*, 247

Pa. Super. 61, 371 A.2d 1326 (197); *Action Industries, Inc. v. Wiedeman*, 236 Pa. Super. 447, 346 A.2d 798 (1975). The long-arm statute in effect at the time this action was instituted[4] provided in pertinent part:

> Any foreign corporation which shall have done any business in this Commonwealth without procuring a certificate of authority to do so from the Department of State as required by statute, shall be conclusively presumed to have designated the Department of State as its true and lawful attorney authorized to accept, on its behalf, service of process in any action arising within this Commonwealth. Service of process shall be made in the manner provided by section 8307 of this title (relating to procedure for service of process).
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> * * * * * * * *
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> (a) General rule.—Any of the following shall constitute "doing business" for the purposes of this chapter:

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[4] Act of Nov. 15, 1972, P.L. 1063, No. 271, 42 Pa. C.S.A §§8301-8309 (Purdon's Supp. 1976), *repealed by*, Act of July 9, 1976, P.L. 586, No. 142, §1, effective June 27, 1978, 42 Pa. C.S.A. §§5301-5329 (Purdon's 1979 Pamphlet). The complaint in this case was filed on April 26, 1978, prior to the effective date of the repeal of the Act of Nov. 15, 1972, P.L. 1063, No. 271. It is clear that

> [W]hile substantive rights are settled as of the time the cause arises, rights in procedural matters, such as jurisdiction and service of process, are determined by the law in force at the time of the institution of the action. *Kilian v. Allegheny County Distributors*, 409 Pa. 344, 350, 351, 185 A.2d 517, 520 (1962).

(1) The doing by any person in this Commonwealth of a series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object.

(2) The doing of a single act in this Commonwealth for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object with the intention of initiating a series of such acts.

(3) The shipping of merchandise directly or indirectly into or through this Commonwealth.

(4) The engaging in any business or profession within this Commonwealth, whether or not such business requires license or approval by the Commonwealth or any of its agencies.

(5) The ownership, use or possession of any real property situate within this Commonwealth.

(b) Exercise of full constitutional power over foreign corporations.—In addition to the provisions of subsection (a) of this section the jurisdiction and venue of courts of the Commonwealth shall extend to all foreign corporations and the powers exercised by them to the fullest extent allowed under the Constitution of the United States.

Act of Nov. 15, 1972, P.L. 1063, No. 271, 42 Pa. C.S.A. §§8302(a), 8309 (Purdon's Supp. 1976).

Since the statute makes this state's jurisdiction over a foreign corporation co-extensive with the permissible limits of jurisdiction under the due process clause of the federal

constitution, a determination of the constitutional issue will be dispositive. *Hart v. McCollum,* 249 Pa. Super. 267, 271-72, 376 A.2d 644, 647 (1977).

The United States Supreme Court has stated that for a state to have jurisdiction over an out-of-state defendant, there must be "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945) (citations omitted). In *Hanson v. Denckla,* 357 U.S. 235, 253, 78 S.Ct. 1228, 1239, 2 L.Ed. 2d 1283 (1958), the Court stated that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." In *World-Wide Volkswagen Corporation v. Woodson,* 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed. 2d 490 (1980), the Court described the concept of "minimum contacts" as "protect[ing] the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *Id.* at 292, 100 S.Ct. at 564. The Court also commented on the concept of "reasonableness" or "fairness" embodied in the requirement that a state's jurisdiction "[must] not offend 'traditional notions of fair play and substantial justice,'" stating:

> Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case

be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute, *see McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 [78 S.Ct. 199, 201, 2 L.Ed. 2d 223] (1957); the plaintiff's interest in obtaining convenient and effective relief, *see Kulko v. Superior Court*, [436 U.S. 84, 92 [98 S.Ct. 1690, 1697, 56 L.Ed. 2d 132] (1978)], at least when that interest is not adequately protected by plaintiff's power to choose the forum, *cf. Shaffer v. Heitner*, 433 U.S. 186, 211 n. 37 [97 S.Ct. 2569, 2583, n. 37, 53 L.Ed. 2d 683] (1977); the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several states in furthering fundamental substantive social policies, *see Kulko v. Superior Court, supra*, at 93, 98 [98 S.Ct. at 1697, 1700].

Id.

Finally, the Court stated:

When a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State,' *Hanson v. Denckla, supra* at 253 [78 S.Ct. at 1239-1240], it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.

Id. at 297, 100 S.Ct. at 567.

On the basis of decisions by the United States Supreme Court, this court, in *Proctor & Schwartz, Inc. v.*

Cleveland Lumber Co., 228 Pa. Super. 12, 19, 323 A.2d 11, 15 (1974), has formulated a three-part test:[5]

> First, the defendant must have purposefully availed itself of the privilege of acting within the forum state thus invoking the benefits and protections of its laws. *Hanson v. Denckla, supra.* Secondly, the cause of action must arise from defendant's activities within the forum state. *See Southern Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374 (6th Cir. 1968); *Electric Regulator Corp. v. Sterling Extruder Corp.*, 280 F. Supp. 550 (D. Conn. 1968). Lastly, the acts of the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over it reasonable. *International Shoe Co. v. Washington, supra; see Southern Mach. Co. v. Mohasco Indus., Inc., supra* [401 F.2d 374 (6th Cir. 1968)]; *see also In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220 (6th Cir. 1972); *Kourkene v. American BBR, Inc.*, 313 F.2d 769 (9th Cir. 1963).

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[5] This test was formulated prior to four recent United States Supreme Court decisions: *Rush v. Savchuk*, 444 U.S. 320, 100 S.Ct. 571, 62 L.Ed. 2d 516 (1980); *World-Wide Volkswagen Corporation v. Woodson, supra; Kulko v. Superior Court, supra;* and *Shaffer v. Heitner, supra.* However, since the Court's comments in *World-Wide Volkswagen* suggest that the Court's earlier decisions retain their validity, it is unnecessary to reformulate the test.

And see Bev-Mark, Inc., d/b/a Tuboy Trucking Company, et al. v. Summerfield GMC Truck Co., Inc., et al., 268 Pa. Super. 74, 407 A.2d 443 (1979).

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There can be no question but that the first part of the *Proctor & Schwartz* test has been met. Trimble entered into a contract that contemplated Trimble's performance in Pennsylvania, and pursuant to that contract Trimble entered Pennsylvania. In *Koenig v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO*, 284 Pa. Super. 558, 426 A.2d 635 (1980), we extensively discussed the circumstances in which a nonresident defendant "purposefully avail[s] itself of the privilege of acting within [Pennsylvania]" when it enters into a contract. We held that a critical factor is the contemplation of the parties concerning the place of performance of the contract. Here, it was contemplated that Trimble would enter Pennsylvania to pick up one of the loads of methylene chloride from a Pennsylvania seller. Trimble could not have fulfilled its contract without entering Pennsylvania; it did not, for example, merely pass through Pennsylvania because it chose one route rather than another.

—b—

The question whether the second part of the *Proctor & Schwartz* test has been met requires more discussion. Appellee has not claimed that the contamination of the methylene chloride took place in Pennsylvania but only that it might have taken place here.

—i—

We begin our analysis by recognizing that this is an assumpsit action, as was *Proctor & Schwartz*.[6] In *Proctor & Schwartz* we said:

> The second analytical step requires only that the cause of action arise from the defendant's activities within the forum state. The mere fact that the defendant availed itself of the privilege of doing business in Pennsylvania will not support a cause of action which is unrelated to the defendant's activities in this state. We find in the instant case that the plaintiff's cause of action arose directly from the defendant's acts within this state. The activity which satisfies the "purposefully availed" test above is the entering into contractual obligations. The cause of action arises from the breach of those same obligations.

228 Pa. Super. at 20, 323 A.2d at 15.

The Michigan Court of Appeals has held that "[i]t is sufficient for purposes of due process that the suit be based on a contract which had a substantial connection with the state of the forum. A single transaction may be sufficient to meet the 'minimum contacts' test." *Shepler v. Korkut,*

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[6] In our original opinion in this case we did not give proper recognition to this aspect of the case. We held that to meet the second part of the *Proctor & Schwartz* test it was necessary that some connection between Trimble's activities in Pennsylvania and the contamination of the methylene chloride must be averred before longarm jurisdiction could be asserted over Trimble. For the reasons explained in the text, *infra*, we have concluded that this was not the proper way of stating the second part of the *Proctor & Schwartz* test in an action for breach of a contract.

33 Mich. App. 411, 415, 190 N.W.2d 281, 283 (1971). *See also, Central Insurance Agency Co., Inc. v. Financial Credit Corp.*, 222 F. Supp. 627 (D.D.C. 1963).

In contrast, in actions in trespass the courts have focused on where the injury took place. Thus in the leading Pennsylvania case of *Bork v. Mills*, 458 Pa. 228, 329 A.2d 247 (1974), our Supreme Court held that although a Maryland defendant had done business in Pennsylvania, the business was not so continuous or substantial as to make him subject to suit in Pennsylvania in connection with an automobile accident that had occurred in Virginia. There was no claim in *Bork* that the plaintiff or the accident had any connection with the defendant's business activities in Pennsylvania. *See also, Whalen v. Walt Disney World Co.*, 274 Pa. Super. 246, 418 A.2d 389 (1980); *Lubkuecher v. Loquasto*, 255 Pa. Super. 608, 389 A.2d 143 (1978); *Garfield v. Homowack Lodge, Inc.*, 249 Pa. Super. 392, 378 A.2d 351 (1977).

—ii—

One of the cases relied on by the lower court in this case is *Dornbos v. Kroger Company*, 9 Mich. App. 515, 157 N.W.2d 498 (1968), *appeal dismissed sub nom. Adkins Transfer Company, Inc. v. Dornbos*, 393 U.S. 322, 89 S.Ct. 555, 21 L.Ed. 2d 516 (1969).[7] In *Dornbos* the Michigan Court of Appeals sustained long-arm jurisdiction over an out-of-state common carrier that had transported

[7] Although the plaintiff in *Dornbos* alleged negligence by the defendants, and to that extent at least the case sounded in tort, the court's analysis of the propriety of the exercise of long-arm jurisdiction focused on the contractual relationships among the parties.

a load of fish from Chicago to Tennessee. The fish had been sold by the Michigan plaintiff to a buyer in Tennessee and had been transported from Michigan to Chicago by a Michigan carrier that did not contest jurisdiction. In affirming, the Court of Appeals adopted much of the lower court's opinion, including the following:

> These defendants are in the business of carrying goods in interstate commerce. It is reasonable to assume that they solicit and hopefully anticipate such business. They are in the position of being able to protect themselves from the consequences of their own derelictions. They understand that the nature of their business requires them to have the care and custody of the products and possessions of residents of other states.
>
> 9 Mich. App. at 520, 157 N.W.2d at 501.

In *Dornbos* it was certain that any contamination for which the out-of-state carrier might be found responsible could not have taken place in Michigan because the carrier did not receive the fish until it picked up the fish in Chicago.

Appellant tries to distinguish *Dornbos* as well as *Shepler v. Korkut, supra,* by arguing that in those cases the forum state recognized that it was providing a means of redress for its residents. Language to the same effect may be found in Pennsylvania cases. *E. g., Action Industries, Inc. v. Wiedeman, supra.* However, this court has explicitly held that the fact that a party seeking to assert jurisdiction over a nonresident corporation is itself a nonresident does not affect the scope of our jurisdiction. *Washington v. U. S. Suzuki Motor Corp.*, 257 Pa. Super. 482, 390 A.2d 1339 (1978).

As we read it, the second part of the *Proctor & Schwartz* test may be satisfied by pleading a contract having a significant connection with Pennsylvania, *see Koenig v. International Brotherhood of Boilermakers, supra,* and a breach of that contract. We recognize that it may be argued that this is too broad a reading. However, we believe the proper approach, once a contract that has a significant connection with Pennsylvania and its breach have been pleaded, is to move on to the third part of the test. This approach not only gives effect of the language of *Proctor & Schwartz* describing the second part of the test but also is consistent with our statement there that the third part of the test is actually the most significant. 228 Pa. Super. at 20, 323 A.2d at 16.

—c—

The focus of the third part of the *Proctor & Schwartz* test is on whether "the exercise of jurisdiction in this particular case [would] be fair and reasonable under the circumstances." *Id.*, 323 A.2d at 16. As previously noted, the determination of whether an exercise of jurisdiction is reasonable depends on the burden that would be imposed on the defendant, in light of several factors, including the forum state's interest in resolving the dispute; the plaintiff's interest in obtaining convenient and effective relief; the interstate judicial system's interest in the most efficient resolution of the controversy; and the interest of the several states in furthering substantive social policies. *World-Wide Volkswagen Corporation v. Woodson, supra* at 292, 100 S.Ct. at 564. Here Trimble will be inconvenienced by having to defend in this state, but this is not enough to counterbalance the factors favoring jurisdiction.

See, e. g., Action Indust., Inc. v. Wiedeman, supra. This state has an interest in ensuring that contracts affecting its domiciliaries, Mercer International and Interstate, were not breached, and in safeguarding the transport of chemicals over its highways. Also, since all the other defendants are here, the entire case could be resolved in one trial.

It is easy to imagine a case in which the breach of a contract that had a significant connection with Pennsylvania would be sufficient to meet the first two parts of the *Proctor & Schwartz* test but not the third. This case, for example, would be quite different if Trimble were the only defendant. Thus it illustrates the importance of all three parts of the *Proctor & Schwartz* test in determining whether the exercise of long-arm jurisdiction is consistent with the requirements of fairness and due process as interpreted through the years by the United States Supreme Court in the line of cases represented most recently by *World-Wide Volkswagen Corporation v. Woodson, supra,* and *Rush v. Savchuk, supra.*

Affirmed.

KINGSLEY AND KEITH (CANADA) LIMITED and Kingsley and Keith Chemical Corporation

v.

MERCER INTERNATIONAL CORPORATION and Interstate Chemical Corporation and H. M. Trimble & Sons, Limited.

Appeal of H. M. TRIMBLE & SONS, LIMITED.

SUPERIOR COURT OF PENNSYLVANIA.

Argued Nov. 13, 1979.

Filed Oct. 24, 1980.

Before SPAETH, HOFFMAN and VAN der VOORT, JJ.

SPAETH, Judge:

This case is one of three long-arm jurisdiction cases that we decide today;[1] it is an appeal from an order granting a petition by Kingsley and Keith (Canada), Limited, and Kingsley and Keith Chemical Corporation for leave to serve an amended complaint in assumpsit on H. M.

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[1] The other cases are: *The Union National Bank of Pittsburgh, Exec'r v. L. D. Pankey Institute, et al.*, Pa. Super. , 426 A.2d 624 (1980); *Goff v. Armbrecht Motor Truck Sales, Inc. et al.*, Pa. Super. , 426 A.2d 628 (1980).

Trimble and Sons, Limited, by registered mail to Trimble's headquarters in Canada.[2]

For the purposes of our inquiry, we shall accept as true the well-pleaded facts in the amended complaint. *Cf. Frisch v. Alexson Equip. Corp.*, 423 Pa. 247, 224 A.2d 183 (1966).[3] So regarded, the amended complaint may be summarized as follows.

In 1974, one Canadian corporation, Celanese (Canada), Limited, ordered approximately 80,000 lbs. of methylene chloride from another Canadian corporation, Kingsley and Keith (Canada), Limited. Kingsley and Keith (Canada) then ordered the methylene chloride from Kingsley and Keith Chemical Corporation, a New Jersey corporation, which in turn ordered two tanks of methylene

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[2] The authority for this service may be found in Pa. R.Civ. P., R. 2180(c), which provides:

> If service cannot be made under any of the methods set forth in subdivision (a) or (b) of this rule, the court upon petition shall authorize service by registered mail directed to the Secretary of the Commonwealth and to the corporation or similar entity at its last registered address or principal place of business, or by publication as the court may direct.

[3] In other words, Trimble's argument that the petition for leave to serve it should not have been granted is functionally equivalent to a defendant's argument that its preliminary objections to the complaint should be sustained, in both cases the assertion is that the complaint itself discloses that the action may not be maintained. A party making this assertion must take the complaint at face value. In this regard, it may be noted that the original complaint named Trimac Limited, as a defendant. Trimac Limited is Trimble's parent company. When it filed preliminary objections, an amended complaint was filed, naming Trimble instead of Trimac Limited as a defendant.

chloride (approximately 40,000 lbs. each) from Mercer International Corporation, a Pennsylvania corporation, and arranged with H. M. Trimble and Sons, Limited, a Canadian corporation, to have the tanks transported to Canada. In October 1974, Interstate Chemical Corporation, a Pennsylvania corporation and an affiliate of Mercer International Corporation, sent one tank truck of the methylene chloride to Indianapolis, for transferral there to a Trimble tank truck. In November 1974, Interstate sent another tank truck of the methylene chloride to Mercer, Mercer County, Pennsylvania, for transferral there to a Trimble tank truck. Trimble delivered both tank loads to Celanese (Canada), but Celanese rejected them because the methylene chloride was contaminated. Kingsley and Keith (Canada) and Kingsley and Keith (New Jersey) thereupon brought the present action in Mercer County against Mercer International, Interstate, and Trimble. Generally stated, the allegation is that Mercer International, Interstate, and Trimble were obliged to deliver good methylene chloride to the two Kingsley and Keiths, so that the two Kingsley and Keiths could deliver it to Celanese, but instead, delivered contaminated methylene chloride.

While all this seems complicated, it really is not. Plainly, both Mercer International and Interstate, as Pennsylvania corporations, may be sued in Pennsylvania, and no one contends otherwise; the issue is whether Trimble, a Canadian corporation, may be. This issue may be stated as follows: When a Canadian corporation (Trimble) picks up one load of methylene chloride in Indiana and another load in Pennsylvania, and delivers both loads to Canada, all in fulfillment of a contract between two other Canadian corporations (Celanese and Kingsley and Keith

(Canada)), does it acquire sufficient minimum contacts with Pennsylvania to render itself amenable to the jurisdiction of a Pennsylvania court?

Answers to interrogatories revealed the following. Trimble did not receive a bill of lading from Mercer International, although it should have been the delivery carrier designated on the bill of lading. Trimble did not have authority either from the Pennsylvania Public Utility Commission or the Interstate Commerce Commission to pick up or deliver goods in Pennsylvania; the authority under which the methylene chloride was picked up in Pennsylvania was a "trip-lease" between Coastal Tanklines Limited and Trimble. Prior to the transactions involved here, Mercer International and Interstate had not requested or paid for Trimble's services, nor had they had any business relationship with Trimble. ¶ Before a court in this state may exercise jurisdiction over Trimble, it must appear that Trimble's conduct was within the provisions of this state's long-arm statute, and that application of the statute to Trimble would not violate the due process clause of the Fourteeth Amendment of the United States Constitution. *Monroeville Land Co., Inc. v. Sonnenblick-Goodman Corp. of Western Pa.*, 247 Pa. Super. 61, 371 A.2d 1326 (1977); *Action Industries, Inc. v. Wiedeman*, 236 Pa. Super. 447, 346 A.2d 798 (1975). The long-arm statute in effect at the time this action was instituted[4] provided in pertinent part:

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[4] Act of Nov. 15, 1972, P.L. 1063, No. 271, 42 P.S. §§8301-8309 (Purdon's Supp. 1976), *repealed by*, Act of July 9, 1976, P.L. 586, No. 142, §1, effective June 27, 1978, 42 Pa. C.S.A. §§5301-5329 (Purdon's 1979 Pamphlet). The complaint in this case was filed on April 26, 1978, prior to the effective date of the

Any foreign corporation which shall have done any business in this Commonwealth without procuring a certificate of authority to do so from the Department of State as required by statute, shall be conclusively presumed to have designated the Department of State as its true and lawful attorney authorized to accept, on its behalf, service of process in any action arising within this Commonwealth. Service of process shall be made in the manner provided by section 8307 of this title (relating to procedure for service of process).

* * * * * * *

(a) General rule.—Any of the following shall constitute "doing business" for the purposes of this chapter:

(1) The doing by any person in this Commonwealth of a series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object.

(2) The doing of a single act in this Commonwealth for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object with the intention of initiating a series of such acts.

(3) The shipping of merchandise directly or indirectly into or through this Commonwealth.

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repeal of the Act of Nov. 15, 1972, P.L. 1063, No. 271. It is clear that [w]hile substantive rights are settled as of the time the cause arises, rights in procedural matters, such as jurisdiction and service of process, are determined by the law in force at the time of the institution of the action. *Killian v. Allegheny County Distributors*, 409 Pa. 344, 350, 351, 185 A.2d 517, 520 (1962).

(4) The engaging in any business or profession within this Commonwealth, whether or not such business requires license or approval by the Commonwealth or any of its agencies.

(5) The ownership, use or possession of any real property situate within this Commonwealth.

(b) Exercise of full constitutional power over foreign corporation.—In addition to the provisions of subsection (a) of this section the jurisdiction and venue of courts of the Commonwealth shall extend to all foreign corporations and the powers exercised by them to the fullest extent allowed under the Constitution of the United States. Act of Nov. 15, 1972, P.L. 1063, No. 271, 42 P.S. §§8302(a), 8309 (Purdon's Supp. 1976).

Since the statute makes this state's jurisdiction over a foreign corporation co-extensive with the permissible limits of jurisdiction under the due process clause of the federal constitution, a determination of the constitutional issue will be dispositive. *Hart v. McCollum*, 249 Pa. Super. 267, 272, 376 A.2d 644, 647 (1977).

The United States Supreme Court has stated that for a state to have jurisdiction over an out-of-state defendant, there must be "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L.Ed. 95 (1945) (citations omitted). In *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239, 2 L.Ed. 2d 1283 (1958), the Court stated that "it is essential in each case that there be some act by which

the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its law." In *World-Wide Volkswagen Corporation et al. v. Charles S. Woodson, District Judge of Creek County, Oklahoma, et al.*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed. 2d 490 (1980), the Court described the concept of "minimum contacts" as "protect[ing] the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach beyond the limits imposed on them by their status as coequal sovereigns in a federal system." At 292, 100 S.Ct. at 564. The Court also commented on the concept of "reasonableness" or "fairness" embodied in the requirement that a state's jurisdiction "[must] not offend 'traditional notions of fair play and substantial justice,' " stating:

> Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute, *see McGee v. International Life Ins. Co.*, 355 U.S. 220, 223, [78 S.Ct. 199, 201, 2 L.Ed. 2d 223] (1957); the plaintiff's interest in obtaining convenient and effective relief, *see Kulko v. Superior Court*, [436 U.S. 84, 92, 98 S.Ct. 1690, 1697, 56 L.Ed. 2d 132 (1978)], at least when that interest is not adequately protected by plaintiff's power to choose the forum, *cf. Shaffer v. Heitner*, 433 U.S. 186, 211 n. 37, [97 S.Ct. 2569, 2583 n. 37, 53 L.Ed. 2d 683] (1977); the interstate judicial system's interest in obtaining the most efficient resolution of

> controversies; and the shared interest of the several States in furthering fundamental substantive social policies, *see Kulko v. Superior Court, supra,* [436 U.S.] at 93, 98, [98 S.Ct. at 1698, 1700]. At 292, 100 S.Ct. at 564.

Finally, the Court stated:

> When a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State,' *Hanson v. Denckla, supra,* [357 U.S. 235] at 253, [78 S.Ct. at 1239], it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. At 297, 100 S.Ct. at 567.

On the basis of decisions by the United States Supreme Court, this court, in *Proctor & Schwartz, Inc. v. Cleveland Lumber Co.,* 228 Pa. Super. 12, 19, 323 A.2d 11, 15 (1974), has formulated a three-part test:[5]

> First, the defendant must have purposefully availed itself of the privilege of acting within the forum state

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[5] This test was formulated prior to four recent United States Supreme Court decisions: *Rush v. Savchuk,* 444 U.S. 320, 100 S.Ct. 571, 62 L.Ed. 2d 516 (1980); *World-Wide Volkswagen Corporation et al. v. Charles S. Woodson, District Judge of Creek County, Oklahoma et al., supra; Kulko v. Superior Court, supra;* and *Shaffer v. Heitner, supra.* However, since the Court's comments in *World-Wide Volkswagen,* discussed on pgs. and of this opinion, suggest that the Court's earlier decisions retain their validity, it is unnecessary to reformulate the test.

> thus invoking the benefits and protections of its laws. *Hanson v. Denckla, supra.* Secondly, the cause of action must arise from defendant's activities within the forum state. *See Southern Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374 (6th Cir. 1968); *Electric Regulator Corp. v. Sterling Extruder Corp.*, 280 F. Supp. 550 (D. Conn. 1968). Lastly, the acts of the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over it reasonable. *International Shoe Co. v. Washington, supra*: *see Southern Mach. Co. v. Mohasco Indus., Inc., supra* [401 F.2d 374 (6th Cir. 1968)]; *see also In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220 (6th Cir. 1972); *Kourkene v. American BBR, Inc.*, 313 F.2d 769 (9th Cir. 1963).

And see Bev-Mark, Inc., d/b/a Tuboy Trucking Company, et al. v. Summerfield GMC Truck Co., Inc., et al., Pa. Super. , 407 A.2d 443 (1979).

Application of the *Proctor* test to this case leads to inconclusive results because there is not enough information in the record to determine whether the second part of the test has been fulfilled, that is, whether the cause of action arose from Trimble's activities in this state.[5a] The amended complaint only alleges that Trimble picked up

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[5a] The first part of the *Proctor* test has been fulfilled, for Trimble "purposefully availed itself of the privilege of acting within [Pennsylvania]", both by transporting methylene chloride in this state, see text pgs. 10-11, and by entering into a contract that contemplated Trimble's performance within this state. In *Koenig et al. v. International Brotherhood of Boilermakers, Iron*

the methylene chloride and transported it in this state *and* that it was contaminated when it arrived in Canada. So far as can be determined from the complaint, the contamination could have occurred in Indiana, or Pennsylvania, or Canada, or in any of the states in which the tank trucks went on their way to Canada. Given this uncertainty, we have considered whether to remand for further proceedings. We have concluded, however, that remand is unnecessary.

As the record stands now, it has not been shown that the cause of action is related to Trimble's activities in Pennsylvania. Before a Pennsylvania court may exercise jurisdiction over a foreign corporation on a cause of action not related to the corporation's activities in Pennsylvania, it must appear that the corporation's activities in Pennsylvania were "continuous and substantial." *Bork v. Mills,*

Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO et al., Pa. Super. , 426 A.2d 635 (J. 2054/79, filed / /), we have extensively discussed the question of whether a nonresident defendant "purposefully avail[s] itself of the privilege of acting within [Pennsylvania]" when it enters into a contract contemplating its own or the plaintiff's performance within this state. In *Koenig*, a New York labor union entered into two employment contracts with two New York residents under which the New York residents were required to make trips to Willow Grove and other points in Montgomery County, Pennsylvania, to organize employees and attend meetings as union trustees of the Boilermakers Medical Plan. We held that the labor union's entry into these contracts constituted a "purposeful[] avail[ment] of the privilege of acting within [this state]." *Koenig* is distinguishable from the present case in that there, the record was sufficient to show that the second part of the *Proctor* test had also been met.

458 Pa. 228, 329 A.2d 247 (1974);[6] *The Union National Bank of Pittsburgh, Exec'r v. L. D. Pankey Institute et al., supra; Whalen and Whalen v. Walt Disney World Company and Insurance Company of North America,* Pa. Super. , 418 A.2d 389 (1980); *Lebkuecher v. Loquasto,* 255 Pa. Super. 608, 389 A.2d 143 (1978); *Garfield v. Homowack Lodge, Inc.,* 249 Pa. Super. 392, 378 A.2d 351 (1977). The basis of the "continuous and substantial activities" test is *Perkins v. Benguet Consolidated Mining Co.,* 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952). There, it was held that Ohio had properly exercised jurisdiction over a foreign corporation even though the cause of action was unrelated to the corporation's activities in Ohio; the activities were primarily those of the corporation's general manager and principal stockholder, who held directors' meetings, carried on company correspondence, maintained two bank accounts for company funds, and distributed salary payment and funds to cover purchases of machinery. In *Bork v. Mills, supra,* this court held that the plaintiff's uncontroverted assertion that the defendant hauled freight for hire within this state was not sufficient to meet the "continuous and substantial ac-

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[6] The lower court distinguished *Bork v. Mills, supra,* on the ground that here the cause of action is related to Trimble's activities in this state. As we have just observed, this may be so, but whether it is so cannot be determined as the record now stands. The lower court also stated that *Bork* was based on a prior version of the long-arm statute. This statement, however, fails to recognize the decisions of this court that have applied *Bork* to subsequent versions of the long-arm statute. *See Lebkuecher v. Loquasto, supra; Garfield v. Homowack Lodge, Inc., supra.*

tivities" test. In *Garfield v. Homowack Lodge, Inc., supra,* this court held that the test was met where it appeared that the defendant advertised in a Philadelphia newspaper every week for approximately five years; spent $2,000 annually for this advertising; maintained a toll-free telephone number for Philadelphia area residents to make reservations; and provided advertising brochures to several Philadelphia travel agents to whom it paid a ten per cent referral fee. In *Lebkuecher v. Loquasto, supra,* this court held that the test was not met by showing only that the defendant, a New Jersey physician, possessed a license to practice medicine in this state and maintained a classified listing in a telephone directory in this state. In *Whalen and Whalen v. Walt Disney World Company and Insurance Company of North America, supra,* this court held that the test was not met where the defendant's only uncontroverted contacts with this state were its purchases of $1,551,725 in merchandise and liability insurance from companies located or incorporated in this state. Finally, in *The Union National Bank of Pittsburgh Exec'r v. L. D. Pankey Institute et al., supra,* this court held that the test was not met either as to a Florida dental institute, which had sent information packets to Pennsylvania residents and bought a *de minimis* amount of supplies from Pennsylvania producers, or as to a Florida doctor, who was listed in national medical directories distributed in Pennsylvania and had attended one convention here.

It is apparent that the evidence of Trimble's one trip to this state was not sufficient to meet the "continuous and substantial activities" test. Accordingly, based on the record as it now stands, we must reverse the lower court's order granting leave to serve Trimble.

It should be noted, however, that notwithstanding this holding, if it appears later in the proceedings below, as the action proceeds against Mercer International and Interstate, that Trimble's transportation of the methylene chloride did result in its contamination in Pennsylvania, then Trimble would be amenable to service.[7] By transporting the methylene chloride in this state, Trimble "purposefully availed itself of the privilege of acting within [this state]." *See e. g., Mackensworth v. American Trading Transportation Co.*, 367 F. Supp. 373 (E.D. Pa. 1973) (owner of ship sent it to Pennsylvania to load freight once; action by sailor for unpaid wages upheld). Through its business here, Trimble has benefitted from this state's services and the protection of its laws. The fact that Trimble's involvement with this state was limited to a single transportation contract is not dispositive. Thus jurisdiction has been upheld in the analogous situation of where an out-of-state manufacturer ships only one order

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[7] Trimble has argued otherwise, but the cases it cites are readily distinguishable. Only two of the cases need be mentioned. In *George Transport and Rigging Co. v. International Publications Equipment Corp.*, 425 F. Supp. 1351 (E.D. Pa. 1977), the defendant never entered this state; its only contact was a contract neither negotiated nor executed here, with the plaintiff, a common carrier to transport goods; some of the goods were transported by the carrier over Pennsylvania highways enroute to Indiana and New York. In *Ward v. Baltimore Stevedoring Co.*, 437 F. Supp. 941 (E.D. Pa. 1977), the defendant, a New York freight forwarder, prepared a bill of lading for cargo to be transported from Baltimore to the Soviet Union. The fact that the defendant had placed goods in the stream of commerce where they might enter this state was held insufficient to justify this state's exercise of jurisdiction over defendant.

of goods into this state. *See Columbia Metal Culvert Co., Inc. v. Kaiser Industries, Inc.*, 526 F.2d 724 (3rd Cir. 1975); *Acquarium Pharmaceuticals, Inc. v. Industrial Pressing and Packaging, Inc.*, 358 F. Supp. 441 (E.D. Pa. 1973). *Accord Shepler v. Korkut*, 33 Mich. App. 411, 190 N.W. 2d 281 (1970). *Contra Pinna v. Davis*, 67 A.D. 2d 967, 413 N.Y.S. 2d 460 (1979). Nor would such an exercise of jurisdiction be unreasonable. As previously noted, the determination of whether an exercise of jurisdiction is unreasonable depends on the burden that would be imposed on the defendant, in light of several factors, including the forum state's interest in resolving the dispute; the plaintiff's interest in obtaining convenient and effective relief; the interstate judicial system's interest in the most efficient resolution of the controversy; and the interest of the several states in furthering substantive social policies. *World-Wide Volkswagen Corporation et al. v. Charles S. Woodson, District Judge of Creek County, Oklahoma et al., supra*, 444 U.S. at 292, 100 S.Ct. 564. Here, Trimble would be inconvenienced by having to defend in this state, but this would not be enough to counterbalance the factors favoring jurisdiction. *See, e. g., Action Indust., Inc. v. Wiedeman, supra.* This state has an interest in ensuring that contracts affecting its domiciliaries, Mercer International and Interstate, were not breached, and in safeguarding the transport of chemicals over its highways. Also, since all the other defendants are here, the entire case could be resolved in one trial.

The ORDER of the lower court is reversed, without prejudice to appellees to produce evidence in further proceedings in the lower court to prove jurisdiction over appellant.

IN THE COURT OF COMMON PLEAS OF
MERCER COUNTY, PENNSYLVANIA
CIVIL

No. 725 C.D. 1977
Non-Vehicle

KINGSLEY AND KEITH (CANADA) LIMITED and KINGSLEY AND KEITH CHEMICAL CORPORATION,

Plaintiffs

vs.

MERCER INTERNATIONAL CORPORATION and INTERSTATE CHEMICAL CORPORATION and H. M. TRIMBLE & SONS, LIMITED,

Defendants

Appearances

For the Plaintiff: Thomas T. Frampton, Attorney at Law

For the Defendants, Mercer International Corporation and Interstate Chemical Corporation: M. L. McBride and Timothy L. McNickle, Attorneys at Law

For the Defendant, H. M. Trimble & Sons, Limited: P. Raymond Bartholomew, Attorney at Law

OPINION

ACKER, J.:

This opinion is written pursuant to the requirements of Pennsylvania Rule of Appellate Procedure 1925. On January 15, 1979, this Court entered an Order which permitted service upon H. M. Trimble & Sons, Limited, pursuant to the provisions of the Judicial Code, Act of July 9, 1976, P.L. 586, No. 142, Section 2 [42 Pa. C.S.A. 5323] and so much of the Pennsylvania Rule of Civil Procedure 2180(c) which is not inconsistent with the Judicial Code. The order permitted service upon defendant, H. M. Trimble & Sons, Limited, at 736 Eighth Avenue, Southwest, Calgary, Alberta, Canada, by registered mail, return receipt requested, through the Office of the Sheriff of Mercer County. A motion for reconsideration was denied on February 13, 1979.

Prior to the January 15, 1979 order testimony was taken upon the petition to permit service, interrogatories were served and answered, and stipulations were entered into from which this Court concludes the following facts:

FINDINGS OF FACT

(1) Kingsley and Keith (Canada) Limited (hereinafter referred to as KKL) has its principal place of business in Montreal, Canada. It received an order from Celanese (Canada) Limited for 80,000 pounds of methylene chloride (hereinafter referred to as mc).

(2) KKL then ordered 80,000 pounds of mc from Kingsley and Keith Chemical Corporation (hereinafter referred to as KKCC). KKCC is a New Jersey corporation having Englewood, New Jersey, as its principal place of business.

(3) KKCC then ordered 80,000 pounds of mc from Mercer International Corporation (hereinafter referred to as MIC). MIC is a Pennsylvania corporation having its principal place of business at Mercer, Pennsylvania. Interstate Chemical Corporation is also a Mercer, Pennsylvania, corporation, with Albert L. Puntureri serving as president of both corporations, and for the purpose of this opinion is the same entity as Mercer International Corporation.

(4) KKL, through its Montreal office, entered into a contract with Trimac Transportation, Limited, through its Toronto office, for the delivery of mc to Celanese in Canada.[1]

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[1] In its answer to the petition for service, Trimac described the chain of transportation as follows:

KKL contracted with Oil and Industry Supplies, Limited, a company owned by Stothert Holding, Limited, which in turn is owned by Trimac Transportation, Limited, which in turn is a subsidiary of Trimac Limited. There are eleven affiliate corporations within the Trimac Transportation system and H. M. Trimble & Sons, Limited, is the corporation which actually fulfilled the contract as to transportation as agreed through a stipulation of the parties filed with this Court on October 31, 1978. By stipulation it was further agreed that any reference to Trimac or Trimac Corporation system on any bills of lading or any contract document shall be construed to mean H. M. Trimble & Sons, Limited.

(5) H. M. Trimble & Sons (hereinafter referred to as HMT&S) was to receive the mc from the tank trucks of Interstate Chemical Corporation.

(6) KKCC for KKL made the carrier arrangements and requested that the first shipment be delivered to Indianapolis, Indiana while the second be picked up in Mercer, Pennsylvania.

(7) HMT&S did not have authority to operate within the State of Pennsylvania but was operating in the State of Pennsylvania under the authority of Costal Tank Lines Limited under a "trip lease" basis with HMT&S.

(8) That on or about October 12, 1974, in Indianapolis, Indiana, a tank truck of ICC delivered a truck load of approximately 20,000 pounds of mc to a tank truck operated by HMT&S.

(9) That on or about November 12, 1974, in Mercer, Pennsylvania, a tank truck of ICC delivered a tank load of mc to a tank truck operated by HMT&S and leased to Costal Tank Lines Limited.

(10) Celanese rejected a delivery of both tank loads after learning upon inspection and testing that the mc was contaminated.

(11) HMT&S, the carrier, has no business relationships or contacts touching the Commonwealth of Pennsylvania other than the involvement with the mc of this case which was loaded onto its tank truck operated by HMT&S Mercer, Pennsylvania, on or about November 12, 1974.

DISCUSSION

Former Chapter 83 of the Judicial Code, Sections 8301-8311, (added by Act of November 15, 1972, P.L. 1063, No. 271) [42 Pa. C.S.A. 8301 et seq.] was repealed by the Act of July 9, 1976, P.L. 586, No. 142, Section 2 [Judiciary Act] effective June 27, 1978. It is acknowledged that service cannot properly lie under Section 5301 of the Judiciary Act [42 Pa. C.S.A. 5301]. Rather, the proper basis of personal jurisdiction for HMT&S is Section 5322 [42 Pa. C.S.A. 5322]. This section makes no change in the substantive law and spells out "minimum contacts",

> "Exercise of full constitutional power over nonresidents. —In addition to the provisions of subsection (a) the jurisdiction of the tribunals of this Commonwealth shall extend to all persons who are not within the scope of section 5301 (relating to persons) to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States."

Subsection (b) therefore deals with limited personal jurisdiction. It is agreed that the conduct of the defendant, HMT&S must meet the minimum contact rule as announced in *International Shoe Company vs. State of Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) and more recently declared in *McGee vs. International Life Insurance Company*, 355 U.S. 220, 78 S.Ct. 199 (1957) and *Hanson vs. Denckla*, 357 U.S. 235, 78 S.Ct. 1228 (1958). The minimum contact rule has of course been held to apply in Pennsylvania. *Proctor & Schwartz, Inc. vs. Cleveland Lumber Company*, 228 Pa. Super. Ct. 12, 323 A.2d 11

(1974); *Garfield & Homowack Lodge, Inc. vs. Homowack Lodge, Inc.*, 249 Pa. Super. Ct. 392, 378 A.2d 351 (1977) and *Overseas National Airways, Inc. vs. Saloom*, 52 D. & C. 2d 22 (1971).

Section 5322(b) therefore eliminates the need to engage in the type of dual-tiered analysis. Instead of first determining whether a foreign corporation contacts with the forum fall within the terms of the statute, Pennsylvania may now proceed directly to the constitutional issue. *George A. Davis, Inc. vs. Camp Trails Co.*, 447 F. Supp. 1304, 1313 (E.D. Pa. 1978).[2] The limits of Pennsylvania adjudicating powers are found in *International Shoe, supra*, and its progeny. The due process inquiry focuses on the fairness of requiring the foreign defendant to answer in Pennsylvania considering the impact or lack thereof of his activities on that forum. *General Heat & Power vs. Diversified Mortgage Inv.*, 552 F.2d 556 (3rd Cir. 1977). In determining whether under a particular factual situation a foreign corporation is doing business the courts examine the cases on an ad hoc basis. *Swindell vs. Guyandotte Water & Sewer Development Association*, 425 F. Supp. 830 (W.D. Pa. 1977); *Action Industries, Inc. vs. Wiedeman*, 236 Pa. Super. Ct. 447, 346 A.2d 798 (1975).

Pennsylvania's Long-Arm Statute is expressly intended to extend to the jurisdiction of the courts of this Commonwealth to the fullest extent permissible by the Fourteenth

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[2] In *Inpaco Corp. vs. McDonald's Corp.*, 413 F. Supp. 415, 418 (E.D. Pa. 1976), it was held that although "doing business triggers" in personam jurisdiction over foreign corporations, Pennsylvania Long-Arm Statute is co-existent with substantive jurisdiction through due process.

Amendment. *Proctor & Schwartz, Inc. vs. Cleveland Lumber Company, supra; M & N Meat Company vs. American Boneless Beef Corporation,* 380 F. Supp. 912 (W.D. Pa. 1974); *Kitzinger vs. Gimbel Brothers, Inc.,* 240 Pa. Super. Ct. 345, 368 A.2d 333 (1976); *Crucible, Inc. vs. Stora Kopparbergs Bergslags AB,* 403 F. Supp. 9 (W.D. Pa. 1975).

Further, what may be regarded as fair play and substantial justice to an individual may not be the same as to foreign corporations. *Stepnowski vs. Avery,* 234 Pa. Super. Ct. 492, 340 A.2d 465 (1975).

Guidelines to aid in factual analysis necessary to make the determination of whether the requisite "minimum contacts" are present are set forth in *Proctor & Schwartz, Inc. vs. Cleveland Lumber Company, supra,* page 15,

> "First, the defendant must have purposefully availed itself of the privilege of acting within the forum state thus invoking the benefits and protections of its laws. Secondly, the cause of action must arise from defendant's activities within the forum state (cases cited). Lastly, the acts of defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over it reasonable. (cases cited)"

The theory of this court in holding that there is jurisdiction over HMT&S is well expressed in *Shepler vs. Korkut,* 33 Mich. App. 411, 190 N.W. 2d 281 (1970).

> "It is essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum

> state, thus invoking the benefits and protection of its laws . . . . It is sufficient for purposes of due process that the suit be based on a contract which had a substantial connection with the state of the forum. A single transaction may be sufficient to meet the 'minimum contacts' test. The state of the forum may have a manifest interest in providing effective means of redress for its residents, considering the particular circumstances of the case and that the crucial witnesses may be its residents . . . . The trend in defining due process is toward the court in which both parties can most conveniently settle their disputes." *Gray vs. American Radiator & Standard Sanitary Corporation*, 22 Ill. 2d 432, 176 N.E. 2d 761 (1961).[3]

It has been determined under Pennsylvania law that a single shipment may be sufficient to sustain jurisdiction. *Acquarium Pharmaceuticals, Inc. vs. Industrial Pressing and Packaging, Inc.*, 358 F. Supp. 441 (E.D. Pa. 1973), where the defendant's principal office was in Wisconsin. Plaintiff was doing business in Pennsylvania. The defendant, it is claimed was to manufacture and supply tables for use in a tropical fish business. It is claimed the tables were defective. The defendant answered that it maintains no offices in Pennsylvania and had not done business in the state other than a single shipment of work

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[3] *Gray*, supra, states, page 765, "the trend in defining due process of law is away from the emphasis on territorial limitations and toward emphasis on providing adequate notice and opportunity to be heard; from the court with immediate power over the defendant, toward the court in which both parties can most conveniently settle their dispute."

in product inventory to the plaintiff. This case was decided under the 1972 Long-Arm Statute, supra. The court held that there was sufficient doing business and it is no longer required that there be an intent to enter into a series of acts. The court also answered the contention that *International Shoe,* supra, was not met by the evidence. The court responded at 445 by quoting Justice Black in *McGee vs. International Life Insurance Company,* supra, where the Justice stated that over the years increased expanding state jurisdiction over foreign corporation and other nonresidents was at 201,

> "In part . . . attributable to the fundamental transformation of our national economy over the years. Today many transactions touch two or more states and may involve parties separated by the full continent."

Further, at page 445,

> ". . . concept of 'fair play' and 'substantial justice' which are of immediate concern to us are not static and unchangeable concepts to be applied in a mechanical fashion . . . . They are formulations which must be defined in light of the constitutional, economic and social realities of the 1970s and not of an earlier decade in our history."

In *Action Industries, Inc. vs. Wiedeman,* supra, the contact was by telephone into the State of Pennsylvania with no actual entry by the foreign defendant. The suit, against an Ohio resident, was for breach of employment contract and conversion. The defendant questioned jurisdiction. He had entered into an employment contract

with the petitioner by which he was to perform services for the plaintiff in Pennsylvania. He was a president of a plastic company in Ohio using plaintiff's materials. He was to report to the plaintiff the quantity of materials he had on hand in his Ohio plant. It was alleged that he misrepresented that which he had on hand in that he had converted the materials without knowledge to the plaintiff. The court held Pennsylvania did have jurisdiction for the defendant's contract was for the purpose of his making a profit. Further, the court considered, page 803,

> "Moreover, nowhere in the record does it appear that it would be physically or financially awkward for appellant to defend himself in this state. 'Mere inconvenience to the defendant is not sufficient to deny plaintiff the forum of his choice'."

HMT&S was aware that it was in custody of products supplied by a Pennsylvania corporation. Both tankloads of mc were being shipped pursuant to a contractual agreement. HMT&S should have known that the handling of the mc could have contractual or tort consequences for the Pennsylvania corporation which had contracted to supply it to the plaintiff. As it developed the envisioned contractual consequences arose and the Pennsylvania corporation was sued in Pennsylvania. It is fair and reasonable that HMT&S be called to account for its actions in the same proceeding in which the Pennsylvania corporation is required to defend itself. A case factually close is *Dornbos vs. Kroger Company*, 9 Mich. App. 515, 157 N.W. 2d 498 (1968). There the plaintiffs, residents of Michigan, sued, inter alia, Adkins Transfer Company, a corporation doing business under the laws of the State of Indiana with terminals in Chicago and Nashville. It also sued Tennessee

Cartage Company, a common carrier of that state. Plaintiff had received an order from Kroger Company at its Nashville, Tennessee, offices for a shipment of smoked fish, f.o.b. Grand Haven. The fish were sealed in vacuum packages marked "Keep Under Refrigeration." They were transferred to Adkins at Chicago which in turn transported the fish to Nashville, Tennessee, where they were turned over to Tennessee Cartage Company which delivered the fish to Krogers. It was alleged that due to negligence in handling of the products the fish became contaminated and caused death when eaten. Both Adkins and Tennessee Cartage moved to quash the service claiming that the Michigan Long-Arm Statute was a denial of due process and an undue burden on Interstate Commerce. The Michigan Court of Appeals quoted the lower court, page 501,

> "These defendants are in the business of carrying goods in interstate commerce. It is reasonable to assume that they solicit and hopefully anticipate such business. They are in the position of being able to protect themselves from the consequences of their own derelictions. They understand that the nature of their business requires them to have the care and custody of the products and possessions of residents of other states. It is foreseeable that their negligent handling of these products and possessions may have tortuous consequences in other states."

Further,

> ". . . the very nature of the business of these defendants creates the necessary minimum contacts with those states which produce the products that enter interstate commerce."

Dornbos vs. Kroger Company, supra, was relied upon as authority in *J. Henrijean & Sons vs. M. V. Bulk Enterprise*, 311 F. Supp. 417 (W.D. Mich. 1970). Steel had been shipped from Europe to New Orleans and then by a barge line which transported it to Chicago and then trucked from Chicago to Michigan. The barge owner challenged the jurisdiction. The court held that the allegation that the barge owner knew the shipment of steel was destined for ultimate delivery in Michigan and that it rusted on the barge while in transit from New Orleans to Chicago gave jurisdiction over the barge owner, being a Delaware corporation, under the Michigan Long-Arm Statute. In referring to *Dornbos* supra, the Court stated, page 421,

> "However, the most persuasive reason for following the Dornbos decision is its logic. That court's opinion exhibits keen awareness of the need to readjust, 'traditional notions of fair play and substantial justice,' to the realities of modern commercial conditions. In the light of the commercial setting of this transaction, the nature of the defendant's overall activities, its ability to protect itself from the effects of its own negligence, and the foreseeable possibility that its negligence will have tortuous consequences in other states, it does not seem offensive to the concept of fair play and justice to permit this plaintiff to bring this suit in the forum where the consequences of the defendant's acts occur."

Finally, consideration should be given to Section 49 of the Restatement of Conflicts 2d dealing with foreign corporations—doing an act in-state (2),

> "A state has power to exercise judicial jurisdiction over a foreign corporation which is done, or has

> cause to be done, an act in the state with respect to any cause of action not in tort arising from the act unless the nature of the act and the corporation's relationship to the state makes the exercise of such jurisdiction unreasonable."

By Section 51 of the Restatement of Conflicts 2d, Subsection (2),

> "The state has power to exercise judicial jurisdiction over a foreign corporation which has owned, used or possessed a chattel in the state with respect to any cause of action arising from the chattel while it was in the state and was so owned, used or possessed, unless the nature of the chattel or the corporation's relationship to the state makes the exercise of such jurisdiction unreasonable."

Section 38 is similar. Both sections are deemed to be applicable to contract actions. Restatement of Conflicts Second—Judicial Jurisdiction, page 164.

Defendant's (HMT&S) cases are distinguishable. *George Transport and Rigging Co. vs. International Publications Equipment Corp.*, 425 F. Supp. 1351 (E.D. Pa. 1977) was an action to recover for services of the plaintiff, also a Maryland corporation, to transport five shipments of the defendant's goods from Maryland to various destinations in Illinois, Indiana and New York. Some of the shipments were transported over the Pennsylvania highways. The court held that to permit jurisdiction over the defendant would offend due process through the Fourteenth Amendment. Defendant, however, never came into Pennsylvania itself and had committed no tortuous act within the Commonwealth. The carriage of the goods was

neither negotiated nor executed in Pennsylvania. There was never a certificate to do business issued in Pennsylvania or required. In the case at bar, the defendant, Trimble, did come into Pennsylvania and pick up at least one-half of the total shipment. The contamination may have occurred during the loading or cartage in Pennsylvania. At least the defendants, Mercer International and Interstate Chemical, should have the opportunity to prove so, if they so desire. In *Bork vs. Mills*, 458 Pa. 228, 329 A.2d 247 (1974), also relied upon by the defendant, Trimble, it was held the Long-Arm Statute cannot be used to gain service upon a foreign corporation on a cause of action that is unrelated to the defendant's activities in Pennsylvania. In the case at bar the cause of action is related to Trimble's business in Pennsylvania. Further in *Bork*, the court did not consider the effect of 42 Pa. C.S.A. 8309(b) which extends jurisdiction to the fullest extent allowed under the United States Constitution for service in *Bork* was made prior to the effective date of this section.

Finally, in that the Legislature has seen fit to open the courts of Pennsylvania to non-resident corporations in the first instant, there is no reason to accord non-resident's litigants narrower rights than resident litigants. *Washington vs. Suzuki*, —— Pa. Super. Ct. ——, 390 A.2d 1339 (1978). Therefore, when Kingsley and Keith, Limited, come into Mercer County for determination of their rights against the two Mercer corporations they, as well as the Mercer corporations, should have the opportunity to have all the parties' rights litigated in the same jurisdiction. We do not conclude that the minimum contacts required under the United States Constitution's Fourth Amendment are lacking. Rather, we feel that Trimble intended to enter

into a business relationship with the defendants to satisfactorily carry their products to the Canadian destination. If they failed to do so, they must answer in Pennsylvania for their deeds.

Hence, we reaffirm the previous Order of this Court dismissing the objections to service upon H.M. Trimble & Sons, Limited.

By the Court,

(s) Albert E. Acker,
J.
Albert E. Acker,
Judge

April 11, 1979

Per Curiam Order, Supreme Court of Pa.

IN THE SUPREME COURT OF PENNSYLVANIA

No. 1 W.D. Appeal Docket 1982

KINGSLEY AND KEITH (CANADA) LIMITED and KINGSLEY AND KEITH CHEMICAL CORPORATION

v.

MERCER INTERNATIONAL CORPORATION and INTERSTATE CHEMICAL CORPORATION and H. M. TRIMBLE & SONS, LIMITED

Appeal of H. M. Trimble & Sons, Limited

Appeal from Order of Superior Court entered June 26, 1981, at No. 116 April Term 1979, 291 Pa. Super. 96, 435 A.2d 585 (1981).

Argued: September 23, 1982

ORDER

PER CURIAM, Filed: February 9, 1983

The Court being equally divided, the Order of the Superior Court is affirmed.

Mr. Chief Justice Roberts files an Opinion in Support of Affirmance in which Mr. Justice Larsen and Mr. Justice Flaherty join.

Mr. Justice Nix files an Opinion in Support of Reversal in which Mr. Justice McDermott and Mr. Justice Hutchinson join.

Former Chief Justice O'Brien did not participate in the decision of this case.

Denial of Reargument

THE SUPREME COURT OF PENNSYLVANIA
Western District

Carl Rice, Esq.
Prothonotary
Irma T. Gardner
Deputy Prothonotary

801 City-County Building
Pittsburgh, Pa. 15219

March 31, 1983

P. Raymond Bartholomew, Esquire
Cusick, Madden, Joyce and McKay
First Federal Building
Sharon, Pennsylvania 16146

In Re: Kingsley and Keith (Canada) Limited, et al. v. Mercer International Corporation, et al.

Appeal of H. M. Trimble & Sons, Limited

No. 1 W.D. Appeal Docket 1982

Dear Mr. Bartholomew:

The Court has entered the following Order on your Application for Reargument filed in the above matter:

"March 28, 1983

Application denied.

Mr. Justice McDermott did not participate in this determination.

Per Curiam"

Very truly yours,
(s) C. Rice
Carl Rice, Esquire

CR/ss
cc: Thomas T. Frampton, Esquire
M. L. McBride, Jr., Esquire
Honorable Albert E. Acker